

No. 12,737

IN THE
United States Court of Appeals
For the Ninth Circuit

STANDARD OIL COMPANY OF CALIFORNIA,
a corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITIONER'S OPENING BRIEF.

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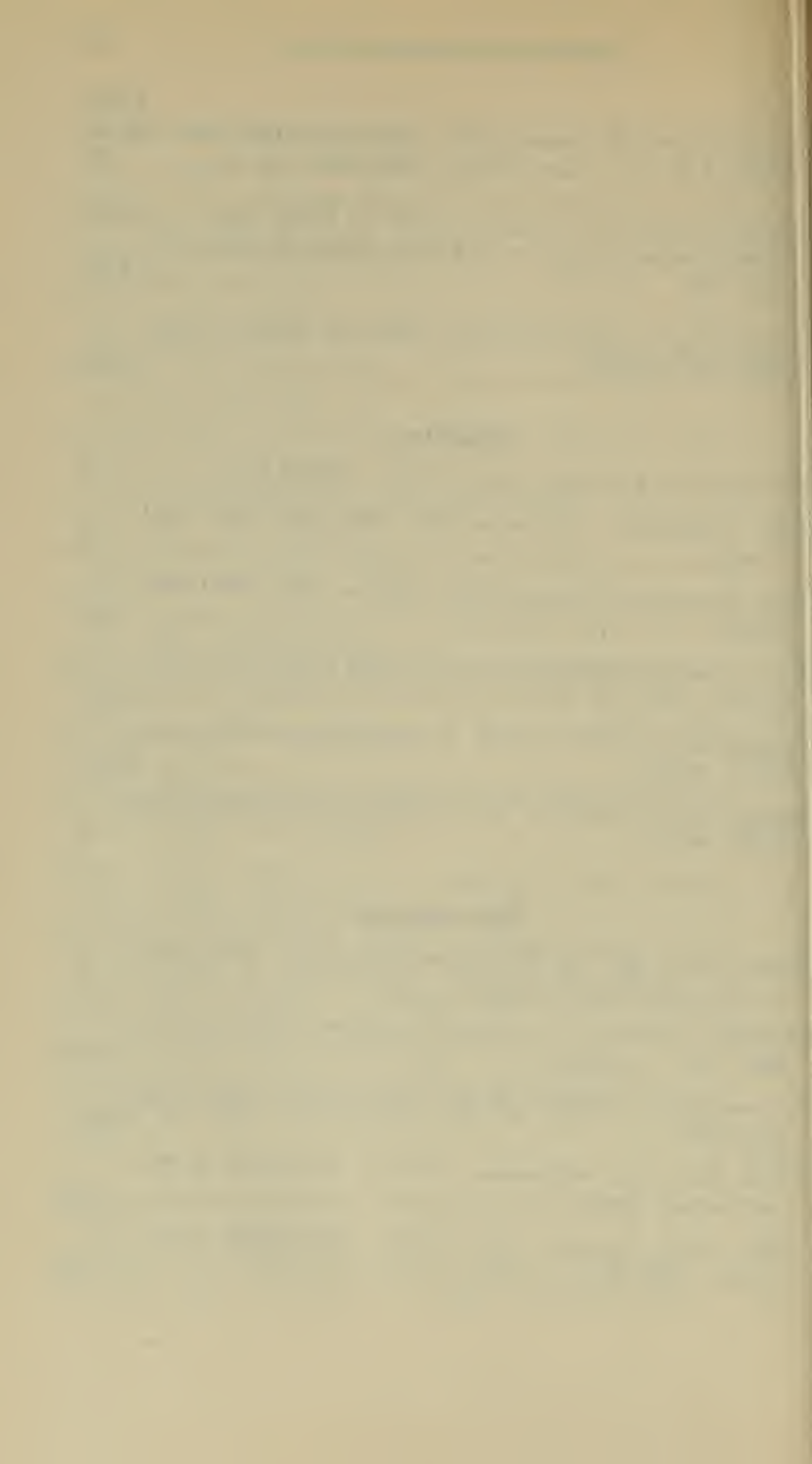
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a corporation,

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vs.

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Respondent.

PETITIONER'S OPENING BRIEF.

STATEMENT AS TO JURISDICTION.

Following a two months' strike attended by violence and disorder at the Richmond, California, refinery of petitioner Standard Oil Company of California (hereafter called "the Company"), the Company discharged 62 strikers. Oil Workers International Union, CIO (hereafter called "the Union"), filed charges with the National Labor Relations Board (hereafter called "the Board") alleging that by the discharges the Company had committed an unfair labor practice (R. 427, 430, 436). Pursuant to the charges, the Board issued a complaint against the Company as to 56¹

¹The complaint originally named 60 complainants, but the complaint was dismissed as to 4 during the hearing before the Board's trial examiner.

of the persons discharged (hereafter called "complainants") alleging violation of sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act, as amended, (hereafter called "the Act")² (R. 442). The Company filed an answer denying the alleged violations (R. 449). After a hearing the Board issued its decision and order dismissing the complaint as to 13 complainants and ordering the Company to reinstate the remaining 43 (R. 208). The Company petitioned this Court to review and to vacate and set aside the Board's order and decision (R. 4504). The Board answered the petition and requested enforcement of the order (R. 4517).

The Company is aggrieved by the order of the Board which is a final order, granting in part the relief sought by the Union against the Company. The unfair labor practice in question is alleged to have been engaged in in the City of Richmond, County of Contra Costa, State of California, within this district (R. 444). The Company transacts business in the State of California and elsewhere within this district (R. 443). Said petition was filed pursuant to, and this Court has jurisdiction to review the Board order under the provisions of section 10(f) of the National Labor Relations Act, as amended.³

This review of Board action is governed by the Labor Management Relations Act, 1947 (29 USCA, sec. 141 et seq.), and the Administrative Procedure Act (5 USCA, sec. 1001, et seq.), and requires consideration of the record as a whole to determine whether the Board's findings

²29 USCA sec. 158(a)(1), (3).

³29 USCA sec. 160(f).

and conclusions are supported by substantial evidence (*Universal Camera Corp. v. N.L.R.B.* (Feb. 26, 1951) 95 L.Ed. 306; *Pittsburg S. S. Co. v. National Labor Relations Bd.* (6 Cir. 1950) 180 F.2d 731, affirmed (Feb. 26, 1951) 95 L.Ed. 319).

STATEMENT OF THE CASE.

This review involves the Company's right to discharge 43 employees who, with 19 others, were discharged after a strike by approximately 3,600 employees at the Company's Richmond, California, refinery in September and October, 1948. The evidence covers an extended period of general violence and disorder in addition to the particular misconduct in which each of the complainants was involved. The record consists of over 4500 pages, the testimony of 144 witnesses, and over 100 exhibits.

Because the Board mistook the issue to be decided and failed to consider the record as a whole, its findings do not correctly show the facts established by a preponderance of the evidence or reflect many of the undisputed material facts. It did not consider the evidence to determine whether the Company acted reasonably or lawfully. Neither did it weigh the evidence to determine the probability of misconduct by the complainants in accordance with the preponderance of the testimony. Its approach is based on the assumption that the Company violated the law and, to avoid the penalty of reinstatement with back pay, had the burden of establishing the criminal guilt of each of the complainants.

The Board found, under the heading "Background" (R. 241-243), that preceding the discharges the Union called a strike which continued from September 3d to November 8, 1948. The record also shows that a prolonged campaign of assaults, property damage, sabotage and organized intimidation coincided with the strike and preceded the discharges. The Board ignores this entirely. In fact, the attempt by the Board's trial examiner to treat the complainants more or less alphabetically and separately without reference to the over-all circumstances has resulted in many inconsistent findings⁴ and unusual disparity between the findings and the record.

To determine "the reasonableness and fairness" of the Board's decision, the reviewing court is required to canvass "the whole record" (*Universal Camera Corp. v. N. L. R. B.* (Feb. 26, 1951) 95 L.Ed. 306). In aid of the

⁴Compare the finding (R. 258-259) that "Regarding what transpired on October 5, Anschutz credibly testified * * * that none of the cars were blocked by picketers or anyone else; that no employee or any car was prevented from entering the lot; and that all cars were permitted to enter the lot without molestation to their occupants or damage to the car" with the findings (R. 370) relating to the same time and place that "a great deal of rowdiness went on at the parking lot that day. Several men were arrested and several cars were damaged," and (R. 397) that "Police Officer Baroni testified credibly that he saw Vetter break the window of Dawson's car as it was entering the parking lot * * *."

Compare the finding (R. 248) that "Thomas Ogden * * * testified and the undersigned credits * * * [his] testimony" with the finding (R. 383) that "Ogden's testimony is worthy of no credence whatsoever and the undersigned so finds."

Compare the finding (R. 254) that "The undersigned was favorably impressed with the frankness and sincerity with which * * * [Patrick A.] MacDonald * * * testified" with the finding (R. 365-366) that Patrick A. MacDonald did *not* testify in an "honest and forthright manner."

Court's review of a very voluminous record, we state the facts as fully as necessary, yet as briefly, as the record will permit.

THE FACTS.

For several years prior to 1948, the Company dealt with the Union as collective bargaining representative of some of the employees at the Company's refinery at Richmond, California. To enforce a demand for higher wages the Union called a strike on September 3, 1948 (R. 463), and immediately established picket lines. It is undisputed that the strike was an economic strike.

The Union secretary testified to a course of dealing between the Union and the Company which demonstrated a singular absence of antiunion bias on the part of management (R. 462-474).⁵

Both the secretary of the Union and the Company's manager testified that bargaining on the issues in dispute continued during the strike until near the end of October, 1948, when a Labor Board election was ordered (R. 463-466, 4335). Thereafter, informal meetings were held to discuss reinstatement of the employees on strike. The Union secretary testified that at these meetings the Com-

⁵"The employer is entitled to have its conduct considered in the light of this history, with its complete absence of hostility to the union" (*Pacific Gamble Robinson Co. v. National Labor Rel. Bd.* (6 Cir. 1950) 186 F.2d 106, 109). See also *Peninsula & Occidental S. S. Co. v. National Labor R. Bd.* (5 Cir. 1938) 98 F.2d 411, 415; certiorari denied 305 U.S. 635; and *Boeing Airplane Co. v. National Labor Relations Board* (10 Cir. 1944) 140 F.2d 423, 435.

pany representatives stated that all strikers would be put back to work except a few who "had engaged in certain activities which they didn't consider were good for an employee of the Company to engage in" (R. 472), and which "made it necessary for them not to rehire certain people" (R. 469).

R. K. Rowell, general manager of the refinery, who made the final decision to discharge the complainants, testified at length. His testimony is not contradicted in any respect and stands unimpeached. He testified that he had the responsibility of operating the plant in a safe manner and to see that it was properly protected and safeguarded (R. 4387). The refinery includes cracking plants for synthetic gasoline manufacture under extremely high pressures and high temperatures, a hazardous operation (R. 4333).

Prior to the strike on September 3, 1948, over 3,900 nonsupervisory or classified employees were employed in the refinery (R. 4336). The Company had been negotiating with the Union when the current contract expired and the strike was called (R. 4334). On the first shift, after the strike was called, 277 nonsupervisory employees continued to work (R. 4339; Resp. Exh. 87). Almost daily thereafter the working force increased until 2,435 men were working when the strike was terminated by the Union on November 7, 1948 (Resp. Exh. 87). No new employees nor anyone not on the Company payroll prior to the strike was employed during this period (R. 4342-4343).

At the beginning of the strike there were not many men on the picket lines, it being just prior to a holiday (R. 4341). Within a few days the number of pickets at a gate

increased to between 50 and 200 (R. 4342). Prevented by mass picketing from using the gates, men who came into the refinery to work came over the fence, under the fence, around through a remote area in the rear of the refinery, by boat and one by airplane (R. 4339). Workers who got into the refinery stayed in, slept and were fed in the refinery (R. 4340).

Rowell testified that, because of the mass picketing and threatened violence, on September 10, 1948, the Company applied for and obtained a temporary restraining order from the Superior Court in Contra Costa County (R. 4345). The order limited the number of pickets to four at a gate and prohibited congregating, gathering or massing in front of or within 200 yards of the gates (Resp. Exh. 40).

On the following Monday, September 13th, some A. F. of L. workers returned to work at the refinery. Mobs gathered on Standard Avenue leading to the refinery and attempted to prevent the workers from coming into the plant (R. 4341). Other witnesses elaborated on these events and in addition testified that on the following day, September 14th, an even larger mob barricaded the streets, rioted and was dispersed only after the use of tear gas by the city police (R. 2927, 3050-3056, Resp. Exh. 43 and 92 [rejected]).

On the mornings of October 4th, 5th and 6th, strikers congregated at the entrance to the parking lot near the refinery administration building.⁶ This lot was being used

⁶See "Mass demonstrations at the administration parking lot" *infra* pp. 52-57.

by nonstriking office and laboratory workers. Each day the mob grew larger and more vicious (R. 3081, 3088, 3095). On the third morning there was a riot (R. 4361). The participants in the disorder threatened and assaulted employees (R. 3539, 3802, 3808), cursed office girls (R. 1922, 2855), physically blocked the entrance (R. 2883, 3089, 3460, 3095), smashed automobile windows (R. 3082, 3091, 1876), and fought with and injured a number of policemen (R. 3090, 3113). The mob dispersed only when the non-striking office and laboratory workers had gone to work or no longer attempted to do so.

After the first morning of violence at the parking lot, to secure evidence of violation of the restraining order the Company employed cameramen to take photographs including motion pictures (R. 4361). The motion picture shows the riotous character of the demonstrations (Resp. Exh. 43), and it and other photographs were shown to the workers in the plant to identify the participants (R. 4362, 4397). Contempt charges were filed against all persons identified (R. 4362, 4384; Resp. Exh. 81, 83) and of these 25 employees were discharged. The Board has ordered reinstatement of 14 of the employees. Of these, complainants Anschutz, Borreani, Emmanuele, Grothues, Hammon, Higginbotham, Hollis, McLaughlin, Nelson, Odgen, Peterson and Wyatt were among those adjudged guilty of contempt of court for their part in these activities and fined (R. 147-153, 160-206). As to the other two Gillespie and Polson, the contempt charges were dismissed.

About this time, a number of strikers pursued an automobile occupied by persons assisting nonstrikers to return to work. This automobile was wrecked and its occupants,

including a young woman, were chased into a swamp with cries of "Get the sons of bitches. Get them out of there, those scab strike breakers" (R. 4171). Among the pursuers and involved in the accident were the complainants Dausy and Frank Gayanich.⁷

A few days later three pickets blocked a railroad track and prevented a locomotive from entering the refinery.⁸ One of the pickets told the police "he would not move, that he would lay down on the track first" (R. 3123). The three pickets were the complainants Bradley, Brock and Gunter. They were charged with contempt and convicted (R. 160).

Following these events, a general campaign of vandalism was directed at working employees. Forty-six homes were damaged by breaking of windows and smearing with paint or creosote. Sixty cars were damaged, windows being broken, backs of cars in some cases being smashed, tires and upholstery slashed (R. 4363). During this period, according to reports received by Rowell and substantiated by the evidence, employees coming into the plant were stoned, pursued and molested (R. 4364).

Rowell's testimony regarding the repeated violence was corroborated by J. L. Creighton, the Company's chief special agent who was in charge of the protection of Company property (R. 2903-3034). The Board found that Creighton was a forthright and honest witness (R. 345). Rowell's testimony was further corroborated by other eye witnesses.

⁷See "Pursuit out Castro Street on October 4th," *infra* pp. 62-66.

⁸See "Obstruction of railroad track on October 6th," *infra* pp. 68-69.

In one incident the cars of A. F. of L. members returning from a Union meeting were battered and smashed as they crossed the picket line at the refinery gate.⁹ A fight followed. The pickets claimed they were informed in advance that the workers were returning, and the pickets and their "reserves" were waiting for them (R. 4089, 4365; Resp. Exh. 27). The complainants Lods and MacDonald were among the group waiting at the gate. A few days later, five employees were assaulted while attempting to return to work by driving over a railroad track into the refinery before dawn.¹⁰ They were clubbed, kicked and stoned (R. 4006-4008, 4025). Undisputed circumstantial evidence placed a group of the complainants at the remote scene of the assault at the moment it occurred. In this group were the complainants Alcaraz, Coleman, Martinez, Maczkowski, Ogden and B. Vetter whom the Board orders reinstated. Autry, as to whom the Board refused to issue a complaint, and Pat MacDonald, as to whom the complaint was dismissed by the Board, were also in the group.

At another time, when a car crossed the picket line, a rock fight started in which the complainants Donaldson and Ottino admitted participation.¹¹

During this period a taxicab was followed from the refinery and overturned by a group of men (R. 2734). There were additional assaults on workers trying to get to work (R. 3866, 4295). A police car patrolling in the

⁹See "Assault at Gate No. 16 on October 8th," *infra* pp. 70-72.

¹⁰See "Yacht Harbor Assault on October 12th," *infra* pp. 74-79.

¹¹See "Rock throwing at Gate No. 1 on October 8th," *infra* p. 82.

vicinity of the refinery in the middle of the night was stopped by a gang of men and ordered to identify itself when going by "and, better yet, to get off the street" (R. 3630).

Ernest F. Phipps, acting Chief of the Richmond Police Department, also testified at length to the campaign of intimidation, violence and vandalism (R. 3035-3171). Phipps testified that the campaign of home damage and automobile wrecking reached its peak about October 24th when the police received approximately 20 complaints of window breaking, cars overturned, paint on houses, and creosote thrown through windows during the night (R. 3133-3134). Within approximately a 24-hour period, 21 arrests were made (R. 3134, 4367), and thereafter reports of vandalism diminished (R. 4367).

Apprehended by the police at this time were the complainants Brakke, whom the Board orders reinstated, and John Gayanich, as to whom the complaint was dismissed, in a car with blackjacks, a slingshot and an assortment of rocks (Resp. Exh. 48). Less than 24 hours later, Brakke and thirteen other complainants were found to be involved in an apparent ambush for nonstrikers after the group had attacked a taxicab using the highway near the refinery late at night.¹² In this group in addition to Brakke were the complainants A. Gayanich, Collinsworth, Dausy, Snead, Dodson, Bushong, Langensand, Pittman and Ogden whom the Board orders reinstated, Wyrick and Hershberger as to whom the complaint was

¹²See Ambush on Winehaven Road on October 25th," *infra* pp. 84-88.

dismissed, and Autry, as to whom the Board refused to issue a complaint.

A few hours later, the complainants Hardin and Kelly were arrested by the police after following and stopping another taxicab.¹³

During the strike, Rowell testified, attempts were made to sabotage the refinery by breaking and opening certain locked gas valves (R. 4353-4355), by simultaneously pulling a switch outside the refinery on the main power plant (R. 4356), and later by opening the bottom valves on five 60,000-barrel gasoline storage tanks (R. 4357). Fires occurred on two different sides of a pile of lumber in the northerly and westerly end of the refinery (R. 4357). A smoke bomb was found approximately 30 feet from tanks in the refinery where butane is kept in liquid state under pressure up to around 250 pounds (R. 4358). The Company offered a reward of \$5,000 in each incident. The rewards have never been claimed (R. 4360). However, one of the employees reported to the Company that the complainant Leighty had telephoned him while he was working and said "If you don't get out of there, I'm going to tell what I know about the gas valve" (R. 4041). Also, near the end of the strike, the police arrested the complainants Bright, Hall, Morgan and Vanek in a car following some nonstriking employees when they found upon searching the car a "smoke bomb", the size of a gallon can, identical with the one above mentioned (R. 3696, 3717-3720; Resp. Exh. 62).*

¹³See "Further Arrests on October 25th," *infra* pp. 91-92.

*See "Attempted Acts of Sabotage," *infra* pp. 94-96.

Rowell testified that at and near the end of the strike, there was a general state of confusion and terror among the men working in the plant (R. 4394). There was an atmosphere of terror around the refinery and around the homes (R. 4386; Resp. Exh. 92 [rejected]). In considering the discharge of the men involved, for the protection of the refinery and the people employed, this whole situation, including the general atmosphere of terror, was taken into consideration (R. 4386).

Reports received were checked by the Company's regular staff of three special agents charged with plant protection (R. 4399, 4414). A committee consisting of the general manager, the assistant general manager, the personnel director, the chief special agent and his assistant reviewed each case, and consulted with the Company's attorneys (R. 4372-4373). Almost all of the discharges were defendants in criminal cases or in contempt proceedings in which the Company was an adverse party and which involved the matters considered cause for discharge. For this reason, on advice of counsel, the Company refrained from attempting to interview the men involved (R. 4400, 4415).

Regarding the persons identified in the crowds at the administration parking lot on October 4th, 5th and 6th, and charged with contempt of court, the Company decided that all members of the mob should be discharged because, although a court order limited the number of pickets and prohibited violence, mobs had assembled, breaking windows, insulting and cursing employees and smashing cars, and it was impossible to determine who committed

specific acts (R. 4410). Exceptions were made in the cases of two men with exceptionally long service with the Company (R. 4384-4385). One of them was an officer of the Union with whom the Company bargained (R. 4384).

The Company investigated the rock-throwing fights between workers in the refinery and the men outside. It found that each rock-throwing incident had been preceded by an attack upon cars carrying workers into the plant. In each case such attacks were the cause of the ensuing fight (R. 4405). This was confirmed by eye witnesses (R. 3478, 3513, 4488; Resp. Exh. 19). Rowell felt that under the circumstances the men entering the plant were justified in attempting to protect themselves (R. 4406-4407). He did not think anyone could "expect a man to just stand by and take that abuse without some retaliation" (R. 4412).

The Company did everything possible to avoid and minimize violence. At the beginning of the strike, the Company urged all employees in the refinery not to engage in acts of violence (R. 4343; Resp. Exh. 88). Shortly after the strike began a bulletin was issued to supervisory employees outlining a procedure to be followed in avoiding violence of any kind in efforts to cross the picket lines (R. 4344; Resp. Exh. 34). On numerous occasions, Rowell admonished workers not to throw rocks, not to create any violence from the inside that might cause or add to the general terror in the vicinity (R. 4406). The city police were advised by the Company that they were privileged to enter the plant at any time to arrest anyone

throwing rocks at persons outside the gate (R. 3345). A special car from the Fire and Guard Department was assigned to patrol Castro Street, and floodlights were installed in the area adjacent to No. 1 gate around the boiler shop (R. 4415).

Of approximately 3,600 employees who remained away from work for various periods during the strike, a total of 62 were refused reinstatement because, in the Company's view, they were guilty of acts of violence and vandalism (R. 4412, 4372).

Rowell was satisfied that each of the 62 men discharged, from the information and evidence he had, had committed acts of violence, vandalism, or unlawful acts of some kind (R. 4385). This was his sole consideration in determining whether these people should be discharged (R. 4385-4386). He knew he operated a potentially hazardous plant, and he could not have vandals and hoodlums operating a complex piece of equipment that might be hazardous to both life and property (R. 4387).

Membership in the Union was not considered in determining whether to discharge any person (R. 4373). As to many of the persons discharged, the Company had no way of knowing whether they did or did not belong to the Union. Since, under the contract with the Union, there was voluntary checkoff of Union dues, the Company had only a partial list of Union members. A comparison between the list of discharges and the Union-dues-checkoff list shows that of the 56 complainants, 31 were on the checkoff list and 25 were not (R. 4380-4382; Resp. Exh. 95). Of the 67 Union stewards in the plant only 8 are

among the 56 complainants (R. 4377-4379; Resp. Exh. 94). Of the 23 Union officers in the plant only 2 are among the 56 complainants (R. 4376; Resp. Exh. 93).

The foregoing are the circumstances under which the Company discharged the complainants and the reasons for the discharges. A review of the evidence of the particular incidents in which the various complainants were involved is included in the "Third" point of the Argument herein, *infra* p. 51.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Board erred in denying the Company's motion to dismiss the complaint upon the ground that said complaint was issued contrary to law in that the Congress of Industrial Organizations, a national or international labor organization, of which the charging union, the Oil Workers International Union, C.I.O., is an affiliate or constituent unit, had not complied with the requirements of section 9(h) of the National Labor Relations Act, as amended.
2. The Board erred in ordering reinstatement of persons discharged in the absence of any evidence, substantial or otherwise, that the Company was guilty of an unfair labor practice under the Act.
3. The Board erred in assuming, without evidence thereof and contrary to the evidence, that discharged economic strikers were discharged for striking.

4. The Board erred in holding that misconduct by employees engaged in an economic strike is protected by the Act unless the misconduct is "of such a serious nature" in the opinion of the Board that it in its discretion should withhold reinstatement.

5. The Board erred in holding that the Company had the burden of proving that the persons discharged were guilty of serious misconduct.

6. The Board erred in holding that participation in mass picketing and mass obstruction of the entrances to the Company's refinery was not improper and was a protected concerted activity because there was no direct evidence that the participants gathered pursuant to a preconceived plan to so obstruct entry to the refinery.

7. The Board erred in ordering reinstatement of 15 persons who were discharged for mass picketing and violence in violation of a restraining order of a court of competent jurisdiction, and were thereafter convicted by said court of criminal contempt for said violations.

8. The Board erred in finding that each of the persons named in "Appendix A" (R. 233) to the Board's order did not engage in any improper, illegal or unprotected activity.

9. The Board erred in concluding, without finding any facts in support thereof, that the refusal to reinstate and the discharge of each of the persons named in "Appendix A" (R. 233) to the Board's order "were violative of the Act."

10. The Board erred in making each and all of the findings specified and set out verbatim in "Exceptions of

Respondent, Standard Oil Company of California, to Intermediate Report of Trial Examiner" numbered from 1 to 126, inclusive (R. 22-72), in that each and all such findings are contrary to the preponderance of the testimony and unsupported by substantial evidence on the record considered as a whole.

11. The Board erred in refusing to admit in evidence Respondent's Exhibit No. 92, consisting of parts of the front pages of sixteen newspapers published between September 13, 1948, and October 26, 1948, and circulated generally in the community in which the Company's refinery is located. Said exhibit was offered to show the effect on the community, the workers in the refinery and their families of the unlawful acts established by the evidence (R. 4371). The Company's general manager had testified that the "general atmosphere of terror around the refinery and around the homes" was taken into consideration in deciding to discharge the complainants (R. 4386). Upon identification of the papers constituting the exhibit and the offer in evidence, the following objection was made (R. 4371):

"Trial Examiner Myers. Any objection to that exhibit going in evidence?

Mr. Law. Yes, indeed.

Trial Examiner Myers. I will sustain the objection."

SUMMARY OF THE ARGUMENT.*First*

The complaint in the proceeding before the Board was issued pursuant to a charge filed by the Oil Workers International Union, CIO. It is conceded that the Union was "an affiliate or constituent unit of a national or international labor organization, Congress of Industrial Organizations" which was not at that time in compliance with the provisions of the Act requiring the filing of non-Communist affidavits. The Act specifically prohibits the Board from issuing such a complaint. As the Board was not empowered to issue the complaint, the Board's order based thereon is invalid and must be set aside.

Second

The Board has not proved a case for an order of reinstatement. No such order lies unless the employer has committed an unfair labor practice. An unfair labor practice cannot be assumed; it must be proved. The Board's conclusion that the Company violated the Act is not supported by evidence of any kind. The mere discharge of an *economic* striker, the only showing made by the Board, is not an unfair labor practice. The requirement that the Board must prove an unfair labor practice is not met by the mere assumption that a discharged *economic* striker was discharged for striking; and in this case there is no room even to assume that, when the Company refused re-employment to sixty-two out of several thousand striking employees after two months of violence, disorder, lawbreaking and contempt of injunction by hundreds of strikers, it discharged any of them merely for striking. In reliance upon the cases dealing with *unfair*

labor practice strikers discharged in furtherance of the unfair labor practice, the Board erroneously held that the Company has the burden of proving misconduct of *economic* strikers as an affirmative defense and that reinstatement depends on whether the misconduct was "sufficiently serious." The precedents used by the Board, predicated as they are upon a proved unfair labor practice, have no application to the instant case, where the primary issue is whether the employer has committed an unfair labor practice. Since an order of reinstatement must be predicated upon an unfair labor practice and the Board failed to prove that fact, the order of reinstatement must be set aside.

Third

Even on the erroneous theory that the Board was relieved from proving the commission of an unfair labor practice, the evidence produced by the Company conclusively refuted any possible assumption of its violation of the Act or inference of unlawful motive or purpose in its refusal to re-employ the complainants. The record shows the numerous occurrences of violence, vandalism and unlawfulness which led to the discharges, and the connection of the respective complainants with the occurrences. The preponderance of the evidence amply shows that the conduct of the complainants was unlawful, improper, and unprotected under the Act, and that the Company was fully warranted in discharging them for other than lawful strike activities. Even on the erroneous theory, therefore, that the Company had the burden of defense, the burden was overwhelmingly met and the Board's order of reinstatement must be set aside.

ARGUMENT.

FIRST: THE BOARD'S COMPLAINT WAS ISSUED PURSUANT TO CHARGES FILED BY A UNION ADMITTEDLY AN AFFILIATE OR CONSTITUENT UNIT OF A NATIONAL OR INTERNATIONAL LABOR ORGANIZATION NOT IN COMPLIANCE WITH THE NON-COMMUNIST AFFIDAVIT PROVISIONS OF THE ACT. THE ACT EXPRESSLY PROHIBITS THE BOARD FROM ISSUING SUCH A COMPLAINT. THE BOARD'S ORDER BASED THEREON IS INVALID AND MUST BE SET ASIDE.

Section 9(h)¹⁴ of the Labor Management Relations Act, 1947, provides:

“* * * no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.”

The validity of this provision was upheld by the Supreme Court in *American Communications Ass'n. v. Douds* (1950) 339 U.S. 382.

The Board issued its complaint against the Company in the proceedings which are the subject of this review on March 23, 1949 (R. 442-445). The complaint was issued

¹⁴29 U.S.C. sec. 159(h).

pursuant to a charge filed November 12, 1948, a first amended charge filed December 1, 1948, and a second amended charge dated February 9, 1949. These charges were received in evidence in the proceedings as General Counsel's Exhibits No. 1-A, No. 1-C and No. 1-E, respectively. Each charge states that the Union is an affiliate or constituent unit of a national or international labor organization, Congress of Industrial Organizations (R. 429, 432, 438).¹⁵

Each charge is sworn to by an International Representative of the Union.

The Board concedes that "the officers of the Congress of Industrial Organizations for the first time filed with the Board the non-Communist affidavits described in Section 9(h), on December 19, 1949, which date is subsequent to the issuance of the complaint in this case" (R. 4537).

The Company, by written motion, moved the Board for an order dismissing the complaint upon the grounds that it was issued contrary to said section 9(h) of the Labor Management Relations Act under the above stated facts (R. 119-120). The Board denied the motion (R. 212) because "Congress did not intend that complying labor

¹⁵The original charge and the first amended charge were filed by Oil Workers International Union, Local 561, CIO, and each contains the following (R. 429, 432):

"7. (Full name of national or international labor organization of which it is an affiliate or constituent unit:)

Congress of Industrial Organizations."

The second amended charge was filed by Oil Workers International Union, CIO, and contains the following (R. 438):

"5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization):

Congress of Industrial Organizations."

organizations affiliated with parent organizations such as the American Federation of Labor and The Congress of Industrial Organizations should be denied the processes of the Board because of the failure of such parent federations to comply with section 9 of the Act.”¹⁶

We submit, in the words of the United States Supreme Court, that “To sustain the Board’s contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.”¹⁷

In *National Labor Relations Bd. v. Postex Cotton Mills* (5 Cir. 1950) 181 F.2d 919, the Court held invalid and set aside a Board order predicated upon a complaint issued pursuant to a charge filed by Textile Workers Union of America, CIO, like the union here, affiliated with the Congress of Industrial Organizations, because the CIO, as here, was not in compliance with section 9(h) of the Act.

The *Postex* decision was followed by the Fourth Circuit in *National Labor Relations Bd. v. Highland Park Mfg. Co.* (4 Cir. 1950) 184 F.2d 98. The Court points out (p. 101) that there is “no occasion to emasculate the statute by resorting to forced rules of interpretation when its language is perfectly clear and gives unqualified support to the purpose which Congress had in mind,” and the Board’s order is set aside.

The Supreme Court granted certiorari in the *Highland Park* case on February 26, 1951, 95 L.Ed. 405.

¹⁶26 LRRM 1117, 1170.

¹⁷*Colgate Co. v. Labor Board* (1949) 338 U.S. 355, 363.

Here there is no question of fact. The Board established by its own exhibits in evidence that the Congress of Industrial Organizations is the "national or international labor organization of which [the Oil Workers International Union, CIO] is an affiliate or constituent unit" and that the Board issued its complaint pursuant to a charge made by the Oil Workers International Union, CIO, almost nine months before the Congress of Industrial Organizations complied with section 9(h).

We respectfully submit that the plain language of the statute requires that the Board order in this case be set aside as invalid.

SECOND: THE BOARD HAS NOT PROVED A CASE FOR AN ORDER OF REINSTATEMENT. NO SUCH ORDER LIES UNLESS THE EMPLOYER HAS COMMITTED AN UNFAIR LABOR PRACTICE. AN UNFAIR LABOR PRACTICE CANNOT BE ASSUMED; IT MUST BE PROVED. PARTICULARLY IN THIS CASE, THERE IS NO ROOM EVEN TO ASSUME THAT, WHEN THE COMPANY REFUSED RE-EMPLOYMENT TO SIXTY-TWO OUT OF SEVERAL THOUSAND STRIKING EMPLOYEES AFTER TWO MONTHS OF VIOLENCE, DISORDER, LAW-BREAKING AND CONTEMPT OF INJUNCTION BY HUNDREDS OF THE STRIKERS, IT DISCHARGED ANY OF THEM MERELY FOR STRIKING. IN AN ECONOMIC STRIKE CASE THE BOARD STILL HAS THE BURDEN OF PROOF OF AN UNFAIR LABOR PRACTICE, AND IT ERRED IN HOLDING (A) THAT THE COMPANY HAD THE BURDEN OF PROVING MISCONDUCT AS AN AFFIRMATIVE DEFENSE AND (B) THAT REINSTATEMENT DEPENDS UPON WHETHER THE MISCONDUCT IS "SUFFICIENTLY SERIOUS."

1. THERE IS NO EVIDENCE TO SUPPORT FINDINGS AGAINST THE COMPANY, AND THE REQUIREMENT OF PROOF IS NOT MET BY A MERE ASSUMPTION THAT DISCHARGED ECONOMIC STRIKERS WERE DISCHARGED FOR STRIKING OR FOR LAWFUL STRIKE ACTIVITY.

Under section 10(c) of the Act, (29 USCA sec. 160(c)), a condition to the Board's authority to order reinstatement is proof by a preponderance of the evidence that the employer is guilty of an unfair labor practice.

The case made against the Company by the Board consisted *solely* in establishing the fact that in November, 1948, the Company discharged 62 of several thousand strikers. We submit that this lone fact, on the whole record, is insufficient to support the conclusion that in discharging 43 of the 62 discharged strikers the Company committed an unfair labor practice under either section 8(a)(1) or section 8(a)(3) of the Act.

We realize that we invite skepticism in making so summary a statement of the Board's case when the Court has before it a record containing more than four thousand pages of testimony. That, nevertheless, is the whole case against the Company. In reliance upon the brief testimony of a single witness¹⁸ the General Counsel rested. The Company moved to dismiss.¹⁹ The motion was denied.²⁰ The balance of the record of over 4,000 pages consists of the evidence of a month-long campaign of violence, vandalism, and intimidation, which terrorized a whole community, and the evidence of the complainants' connection therewith upon which the Company based its decision to discharge the complainants.

(a) **There is no evidence to support a finding that the Company committed an unfair labor practice.**

One hundred and forty-four witnesses testified. All but two of the 56 complainants testified. The Union president testified. The Union secretary testified. Yet there is nowhere in 4,000 pages of testimony and in over 90 exhibits any of the criteria to which the Board and the courts ordinarily look in cases of this kind to find indications

¹⁸R. 461-478: Before resting, the General Counsel called one other witness, the complainant George S. Davis. Davis admitted telling the Company's Assistant General Manager that if he crossed the picket line "You are liable to have a rock between your eyes and break your glasses" (R. 514). As to Davis the complaint was dismissed (R. 563).

¹⁹R. 540-552.

²⁰R. 563.

that the law has been violated.²¹ There is not a scintilla of evidence:

(1) that the Company's management was hostile to the Union;

(2) that any representative of the Company ever threatened any person because of his Union membership or activities;

(3) that the Company sought to avoid dealing with the Union or any of its officials;

(4) that the Company failed at any time to bargain or deal fairly and openly with the Union;

(5) that before the strike or during the strike or at any time, the Company attempted to interfere with, restrain or coerce any of its employees in the exercise of their rights of self-organization;

(6) that any of the 43 complainants ordered reinstated were particularly active or that many of them were at all active in Union organization or other lawful Union activities;

²¹Cf.:

National Labor Relations Board v. Cities Service Oil Co. (2 Cir. 1942) 129 F.2d 933;

National Labor Rel. Board v. Idaho Refining Co. (9 Cir. 1944) 143 F.2d 246, 248;

National Labor Rel. Bd. v. Laister-Kauffmann A. Corp. (8 Cir. 1944) 144 F.2d 9, 14;

National Labor Relations Board v. Reeves Rubber Co. (9 Cir. 1946) 153 F.2d 340, 341;

National Labor Relations Board v. Winter (10 Cir. 1946) 154 F.2d 719.

See: Third Annual Report of the National Labor Relations Board, pp. 81-88.

(7) that the Company had any reason to believe any of the 43 persons were particularly active in Union organization or other lawful Union activities;

(8) that as to many of the 43 persons the Company had any way of knowing whether they did or did not belong to the Union; or

(9) that the discharge of these 43 persons could, or that the Company had any reason to believe the discharge would, interfere with the self-organization of the Company's employees.

There is no showing of a pattern in the selection of the complainants to indicate any connection between their alleged Union membership and their discharge or between the act of striking and the discharges. There is to be found no material distinction between the 62 persons discharged and 3,600 other employees except in one particular—their participation in the campaign of intimidation and terrorism that coincided with the strike.

If in fact there was a violation of the law, we submit there would be some indication of it in all this evidence and the Board would not have had to base its case on pure assumption.

It has been pointed out that, together with other circumstances, the failure of an employer to go forward with evidence of his reasons for discharge, may give rise to an inference of an improper or unlawful motive. In this case, the Company did go forward, though the evidence offered by the General Counsel was manifestly insufficient to make out a *prima facie* case, and, we submit, the Company's motion to dismiss when the General Counsel

rested was erroneously denied. The Company presented substantial undisputed evidence of the lawful and valid reasons and motivating considerations for the discharges.

The Board, of course, has the burden of proving the charges against the Company.²² The courts have held that "The Company does not have to prove non-discrimination because of union activities. The Board must prove discrimination because thereof" (*Interlake Iron Corp. v. National Labor Relations Board* (7 Cir. 1942) 131 F.2d 129, 134; *Peoples Motor Express v. National Labor Relations Board* (4 Cir. 1948) 165 F.2d 903, 907).

In this case the Board recognizes that it has the burden of proof but says (R. 224):

"We hold that this requirement is met, as it is here upon a showing that the Respondent [Company] discharged the workers because of their strike activity."

An unfair labor practice is established and the requirement of proof is met only by a showing that the strikers were discharged for lawful strike activities, i.e., concerted activity protected by section 7 of the Act.

The Board statement that it met the requirement of proof is not true, first, because the only evidence is that the persons discharged were economic strikers and this alone is insufficient to show that they were discharged for striking or for lawful strike activity and, second, because the "showing" referred to is an assumption wholly

²²"The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act * * *" (NLRB Rules and Regulations, Series 5, Statements of Procedure, sec. 202.10).

untenable in view of the undisputed background of violence and disorder.

- (b) Proof that the persons discharged were economic strikers does not constitute a showing that they were discharged for striking or for lawful strike activity.

As applied to this case, in the complete absence of any other showing, the rule stated by the Board is that a mere showing that the persons discharged were strikers meets the burden of proof and satisfies the statutory requirements of preponderance of the evidence and substantial evidence on the whole record. The Board's theory is that because the discharged employee participated in a strike it will be assumed, without further evidence, that the employer discharged him for the lawful act of striking.

That theory was rejected by this Court in *National Labor Relations Board v. Citizen-News Co.* (9 Cir. 1943) 134 F.2d 970. The Court said (p. 974) :

“The fact that a discharged employee may be engaged in labor union activities at the time of his discharge, taken alone, is no evidence at all of a discharge as the result of such activities. There must be more than this to constitute substantial evidence.”

The *Citizen-News* case was quoted and followed by the Eighth Circuit in *National Labor Relations Bd. v. Montgomery Ward & Co.* (8 Cir. 1946) 157 F.2d 486, 493, and by the Fourth Circuit in *Peoples Motor Express v. National Labor Relations Bd.* (4 Cir. 1948) 165 F.2d 903, 907. In the *Montgomery Ward* case the Court held (p. 493) :

“The union activities of Skinner are not sufficient in themselves to support an inference that they were the cause of his discharge.”

The law regarding the employer's right to discharge is well settled. The “mere discharge of an employee is not an unfair labor practice” (*Joanna Cotton Mills Co. v. National Labor Relations Bd.* (4 Cir. 1949) 176 F.2d 749, 754). The National Labor Relations Act “does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them” (*Labor Board v. Jones & Laughlin* (1937) 301 U.S. 1, 45). As this court has held, the Act “did not deprive the employer of the right to select or dismiss his employees for any cause except where the employee was actually discriminated against because of his union activities or affiliation” (*National Labor Relations Bd. v. Union Pacific Stages* (9 Cir. 1938) 99 F.2d 153, 177). Membership in a union is not a guarantee against discharge,²³ and “the employee may be discharged for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated” (*National Labor Relations Board v. Condenser Corp.* (3 Cir. 1942) 128 F.2d 67, 75).

See also:

Associated Press v. Labor Board (1937) 301 U.S. 103;

²³*National Labor Relations Board v. Riverside Mfg. Co.* (5 Cir. 1941) 119 F.2d 302, 307;

National Labor Relations Board v. Mylan-Sparta Co. (6 Cir. 1948) 166 F.2d 485, 490;

National Labor Relations Board v. Fulton Bag and Cotton Mills (5 Cir. 1949) 175 F.2d 675, 677.

Martel Mills Corp. v. National Labor Relations Bd. (4 Cir. 1940) 114 F.2d 624, 633;
Pittsburg S. S. Co. v. National Labor Relations Bd. (6 Cir. 1950) 180 F.2d 731; affirmed 19 LW 4136.

Participants in an economic strike as the complainants here were, are no more immune from discharge for misconduct than is a working employee.

As stated in *Hamilton v. National Labor Relations Board* (6 Cir. 1947) 160 F.2d 465 at p. 469: "If an employee engages in such conduct as would justify an employer in discharging him if a strike was not in effect, there is nothing in the Act to prevent such a discharge."

In *Labor Board v. Mackay Co.* (1938) 304 U.S. 333, the Court held that economic strikers retain the status of employees. The Court also held that (p. 345) "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers." The Court thus made it clear that an economic striker like a working employee was not immune from replacement, provided only that he was not discriminated against in violation of the statute.

In *Wilson & Co. v. National Labor Relations Board* (7 Cir. 1941) 120 F.2d 913, the Court considered the right of an employer to discharge participants in a strike, which, like the strike here, "was called without any fault on the part of the petitioner." The Court said (p. 923): "The sole duty resting upon petitioner at that time was to refrain from discriminating against them [the economic strikers] because of their Union activities or

their participation in the strike, and this duty was upon the assumption that the strike was conducted in a lawful manner.”

See also:

National Labor Relations Board v. Ohio Calcium Co. (6 Cir. 1943) 133 F.2d 721, 728;

National Labor Relations Board v. Draper Corporation (4 Cir. 1944) 145 F.2d 199;

National Labor Relations Board v. Indiana Desk Co. (7 Cir. 1945) 149 F.2d 987;

National Labor Rel. Bd. v. Perfect Circle Co. (7 Cir. 1947) 162 F.2d 566;

National Labor Rel. Bd. v. Wytheville Knitting Mills, Inc. (3 Cir. 1949) 175 F.2d 238.

Thus, the mere showing, relied upon by the Board, that the persons discharged were economic strikers is wholly insufficient to support a finding that the discharges violated the Act. The Board had the burden of proving discharge for lawful strike activities at the beginning of these proceedings and the burden of proving that fact by “substantial evidence on the record considered as a whole” remain with it throughout the proceedings. That burden never shifted. (See: *Commercial Corp. v. N. Y. Barge Corp.* (1941) 314 U.S. 104, 110.) This requirement the Board never met.

(c) The “showing” relied upon by the Board is an untenable assumption under the facts of this case.

The evidence shows that the decision to discharge the complainants was made against a background of sabotage to the Company plant, physical assaults on em-

ployees, repeated damage to property and the terrorizing of an entire community. This makes an assumption of discharge for lawful strike activity impossible.

If an inference is to be drawn from the background of the discharges the facts cannot be ignored, as the Board has done here. The Board erred in excluding much of the evidence on the over-all pattern of lawlessness and its effect on the whole community. (See: R. 4371, 4151-4166, 4185-4191.) The Company's general manager had testified that the "general atmosphere of terror around the refinery and around the homes" was taken into consideration in deciding to discharge the complainants (R. 4386). One witness had testified "everyone in the city was terrorized" (R. 4204). In corroboration of this, to show public knowledge, interest and concern, the Company offered in evidence Respondent's Exhibit No. 92, consisting of parts of the front pages of sixteen newspapers published between September 13, 1948, and October 26, 1948, as follows:

PLAN X-DAY FOR BERLIN

MONDAY INDEPENDENT

PRICE 100.000

READERS DAILY

THE SPORTSMAN FINAL

POLICE ASK STRIKE AID



RACES Tense Situation Marks Breaching Of Picket Lines

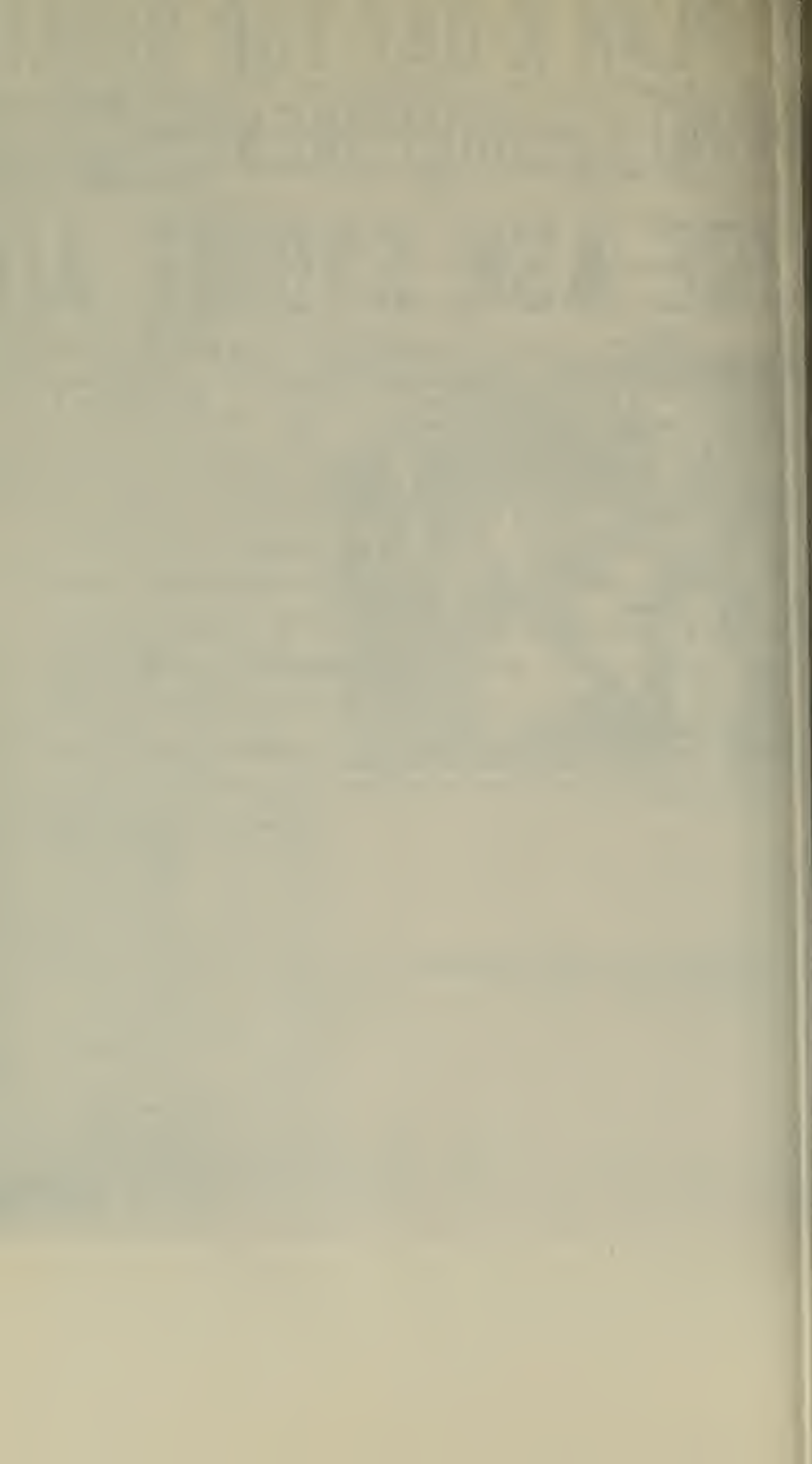
HELMET PARK

PARADISE

Newspaper Richmond Independent
September 13, 1948

NEWTON

Draftees Get
31-Day Notice



Violent Fighting S.O. Refinery

Change in Wind
Saves Ojai As
Thousands Flee

Five Treated at
Hospital Here in
Strike Violence

Scores Injured; Police Fire
Tear Gas At Massed Pickets

Supervisors
Delay Bond
Issue Move

Angry Strikers
Tossed Anything

CIO Orders
Picketing
To Continue

Water Uncertainty
May Shrink Land
Values in Valley

Valuation of
Utilities Up

Building Here
Shows Gain

Dr. Degnan Named Medical
Director of Contra Costa



90 More Mexican
Nationals Seized

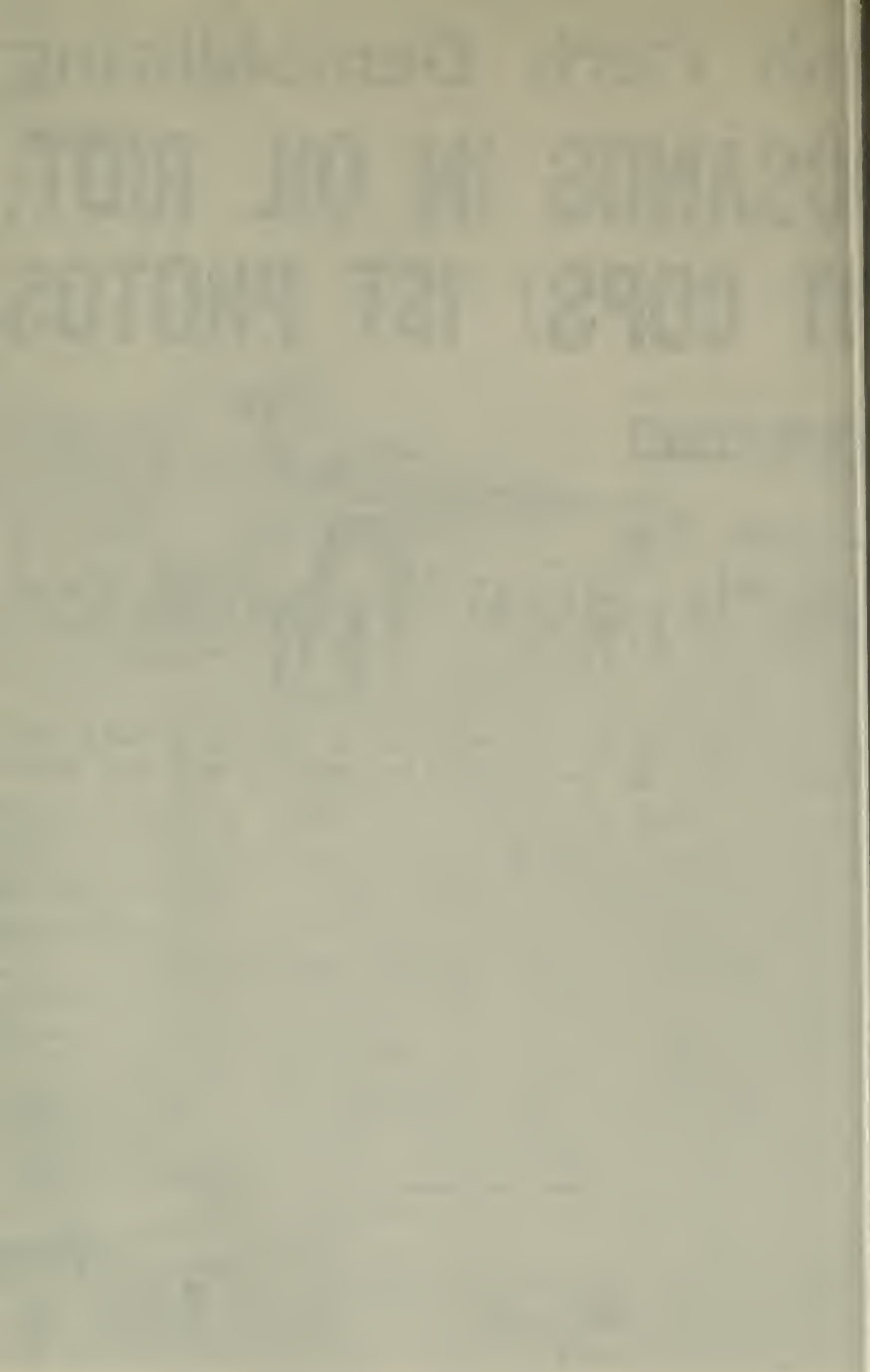
Weather

San Francisco	64-74
Oakland	62-72
San Jose	60-70
Stockton	58-68
Modesto	56-66
Merced	54-64
Hayward	60-70
Contra Costa	60-70
Alameda	60-70
San Mateo	60-70
Marin	60-70
San Francisco Bay Area	60-70

Shells Mixed And
Blast On Opening

Newspaper Richmond Independent
September 14, 1948

[illegible]



Radicals Smear, Tar 4 Homes Here

City Seeking Aid In Settlement of Standard Strike

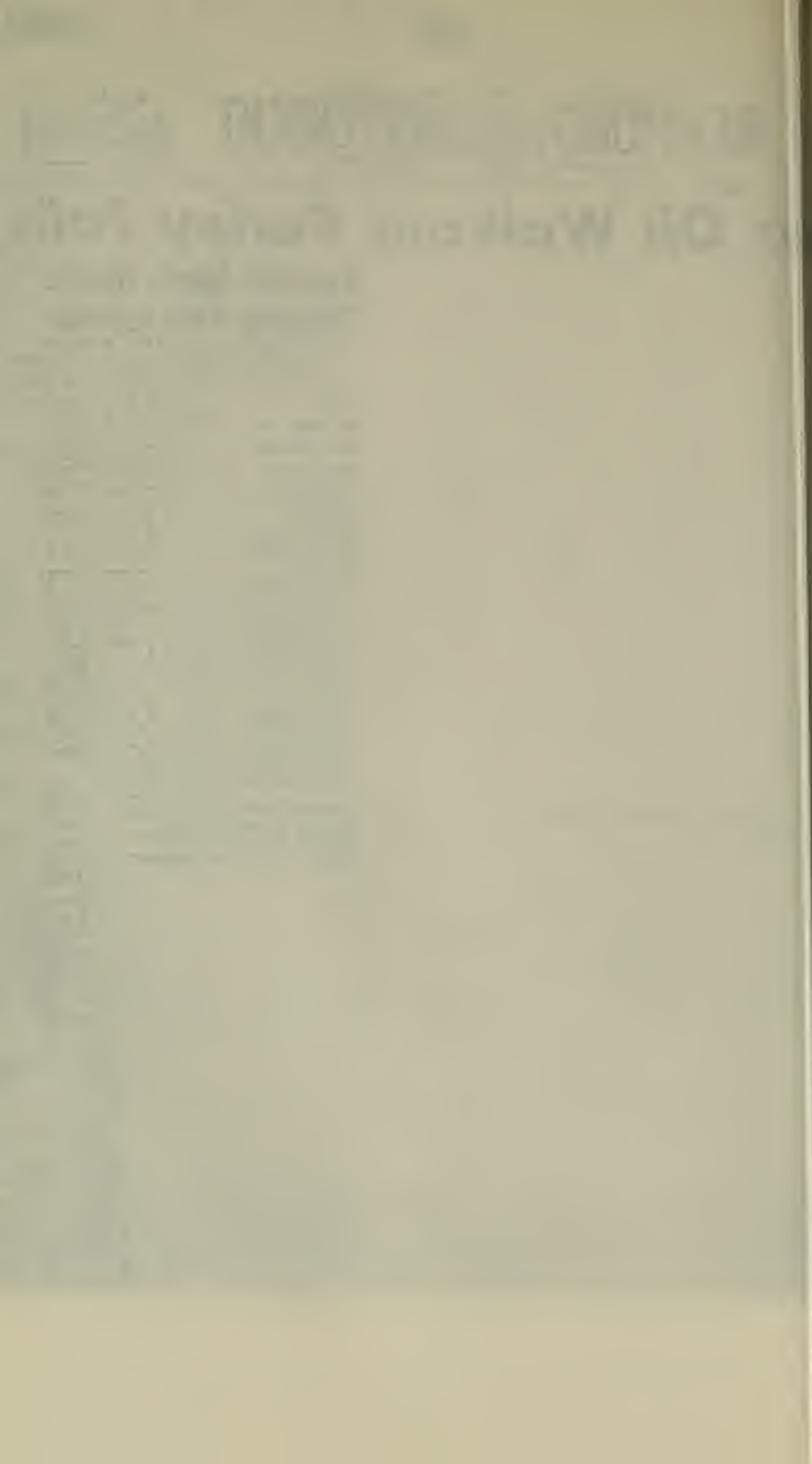
Standard Oil Company of New York and its subsidiaries are seeking aid from the city in settling a strike of its employees. The company claims that the strike is illegal and that it is entitled to the aid of the city in settling the dispute. The city is seeking aid from the federal government in settling the strike. The company is seeking aid from the city in settling the strike. The city is seeking aid from the federal government in settling the strike.

Stocks Fall Today

Stocks fell today as investors reacted to the news of the Standard Oil strike. The Dow Jones Industrial Average fell 10 points to 100. The New York Stock Exchange fell 15 points to 10. The Standard Oil strike is expected to last for several weeks. The company is seeking aid from the city in settling the strike. The city is seeking aid from the federal government in settling the strike.

Stocks in Decline As Selling Climbs

Stocks continued their decline today as selling pressure mounted. The Dow Jones Industrial Average fell 5 points to 95. The New York Stock Exchange fell 10 points to 0. The Standard Oil strike is expected to last for several weeks. The company is seeking aid from the city in settling the strike. The city is seeking aid from the federal government in settling the strike.



State Highway Police Get Orders to Give Protection

Protect Citizens, Knight Tells Highway Patrolmen

Patrolmen are to be ordered to protect citizens in the event of a riot or other disturbance, Knight said. He said that the state highway police are to be ordered to protect citizens in the event of a riot or other disturbance. Knight said that the state highway police are to be ordered to protect citizens in the event of a riot or other disturbance.



Violence On Local Front

Violence on the local front is a serious problem, Knight said. He said that the state highway police are to be ordered to protect citizens in the event of a riot or other disturbance. Knight said that the state highway police are to be ordered to protect citizens in the event of a riot or other disturbance.

Police Hurt in Strike Riot



Officers Subdue, Arrest Sluggers At S.O. Refinery

At least three officers were injured in the rioting at the S.O. Refinery, and one was killed, according to reports from the scene. The riot broke out in the early morning hours of the day, and the police were called to the scene to maintain order. The rioters were seen to be in a state of high excitement, and the police were forced to use force to subdue them. The rioters were seen to be in a state of high excitement, and the police were forced to use force to subdue them.

The riot broke out in the early morning hours of the day, and the police were called to the scene to maintain order. The rioters were seen to be in a state of high excitement, and the police were forced to use force to subdue them.

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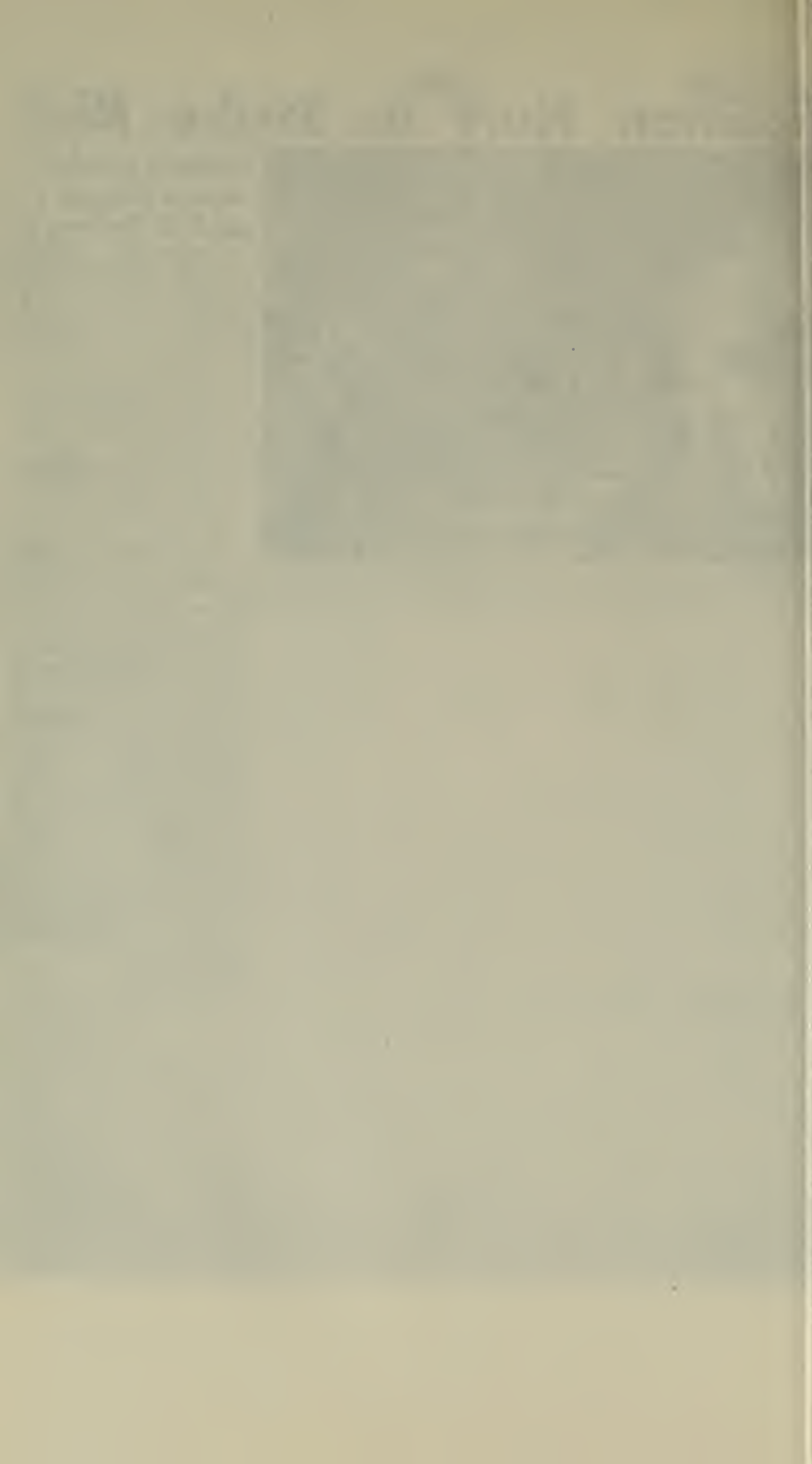
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A black and white photograph showing a large, dense crowd of people gathered outdoors. In the foreground, a man in a light-colored shirt and dark trousers is seen from the back, walking towards the crowd. To his left, a woman in a dark coat and hat is walking. In the center, a man in a light-colored suit and hat is walking. The crowd is dense, and a building is visible in the background. The image has a grainy, historical quality.

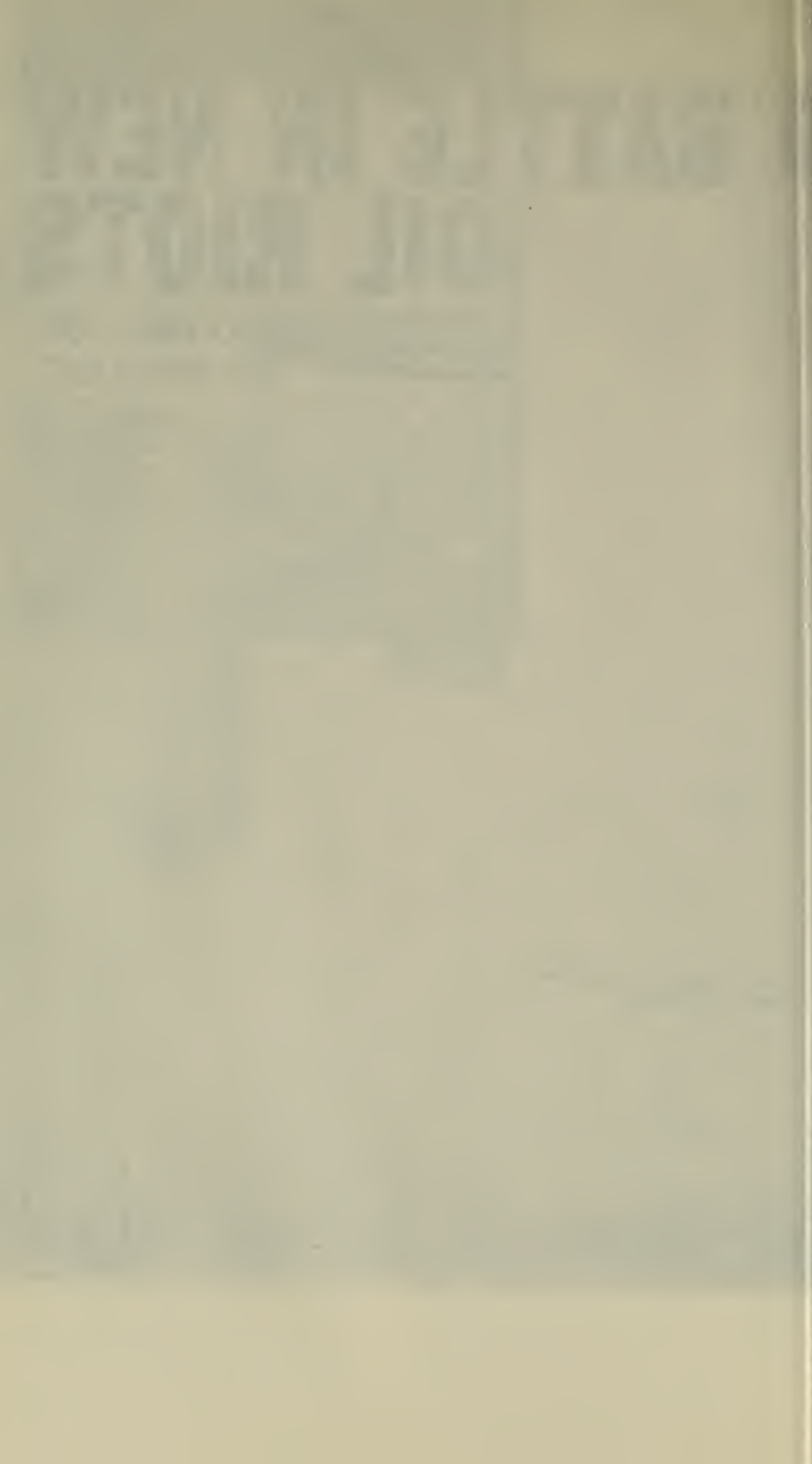
other: re: the above, please direct on Page 1, Gross
Firm Section 1.[illegible]

San Francisco Call-Bulletin
October 6, 1948

IL WORKERS BEATEN NEW STRIKE OUTBURST

Pickets Batter
Workers With
Baseball Bats





Violence Continue as Oil Peace Looms

Violence Flares In Midnight Row At Standard Here

Riots Continue On Oil Front as Settlement Nears

(Continued from Page 1)

Violence flared in the midnight row at Standard Oil Co. here today as the settlement of the oil front continued. The rioting was the latest in a series of disturbances which have been going on since the oil front was opened up. The rioting was the latest in a series of disturbances which have been going on since the oil front was opened up. The rioting was the latest in a series of disturbances which have been going on since the oil front was opened up.

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Rocks Hurlled in Early Morning Refinery Clash

[illegible]

Arrested in Strike Vandalism

Six Felony Warrants Follow Night of Terror

Twenty-one Arrests Follow Night of Terror, Vandalism

Twenty-one arrests were made today following a night of terror and vandalism in the city. The arrests were made by the police and the district attorney's office. The charges range from vandalism to assault and battery. The arrests were made in various parts of the city, including the downtown area and the residential areas. The police are continuing to investigate the incidents and are looking for more suspects. The district attorney's office is also reviewing the cases and is considering further action. The arrests are part of a larger effort to bring an end to the strike-related violence and vandalism. The police are working closely with the community to maintain order and safety. The district attorney's office is also working to ensure that the law is enforced and that justice is served. The arrests are a significant step in the fight against strike-related violence and vandalism. The police and the district attorney's office are committed to bringing an end to these incidents and to restoring peace to the city. The arrests are a testament to the courage of the police and the district attorney's office. They are also a testament to the strength of the law and the justice system. The arrests are a message to the community that the law will be enforced and that justice will be served. The police and the district attorney's office are working hard to bring an end to the strike-related violence and vandalism. They are committed to maintaining order and safety in the city. They are also committed to ensuring that the law is enforced and that justice is served. The arrests are a significant step in the fight against strike-related violence and vandalism. The police and the district attorney's office are committed to bringing an end to these incidents and to restoring peace to the city. The arrests are a testament to the courage of the police and the district attorney's office. They are also a testament to the strength of the law and the justice system. The arrests are a message to the community that the law will be enforced and that justice will be served. The police and the district attorney's office are working hard to bring an end to the strike-related violence and vandalism. They are committed to maintaining order and safety in the city. They are also committed to ensuring that the law is enforced and that justice is served.

Created in 1912 by the
National Bureau of
Standards

U.S. GOVERNMENT PRINTING OFFICE
1912

1912

JAILED IN OIL TERROR

Pickets In Raids On Homes

Thousands of striking workers in the Gulf of Mexico today were jailed and had their homes raided by police in a series of attacks on oil workers and homes.

Police in Houston, Texas, today arrested 100 workers and their families in a series of raids on homes in the city and surrounding areas.

The police said they had received information that the workers were planning to hold a demonstration in the city.

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21 Arrested in Oil Strike Reign of Terror Here

FROM PAGE ONE

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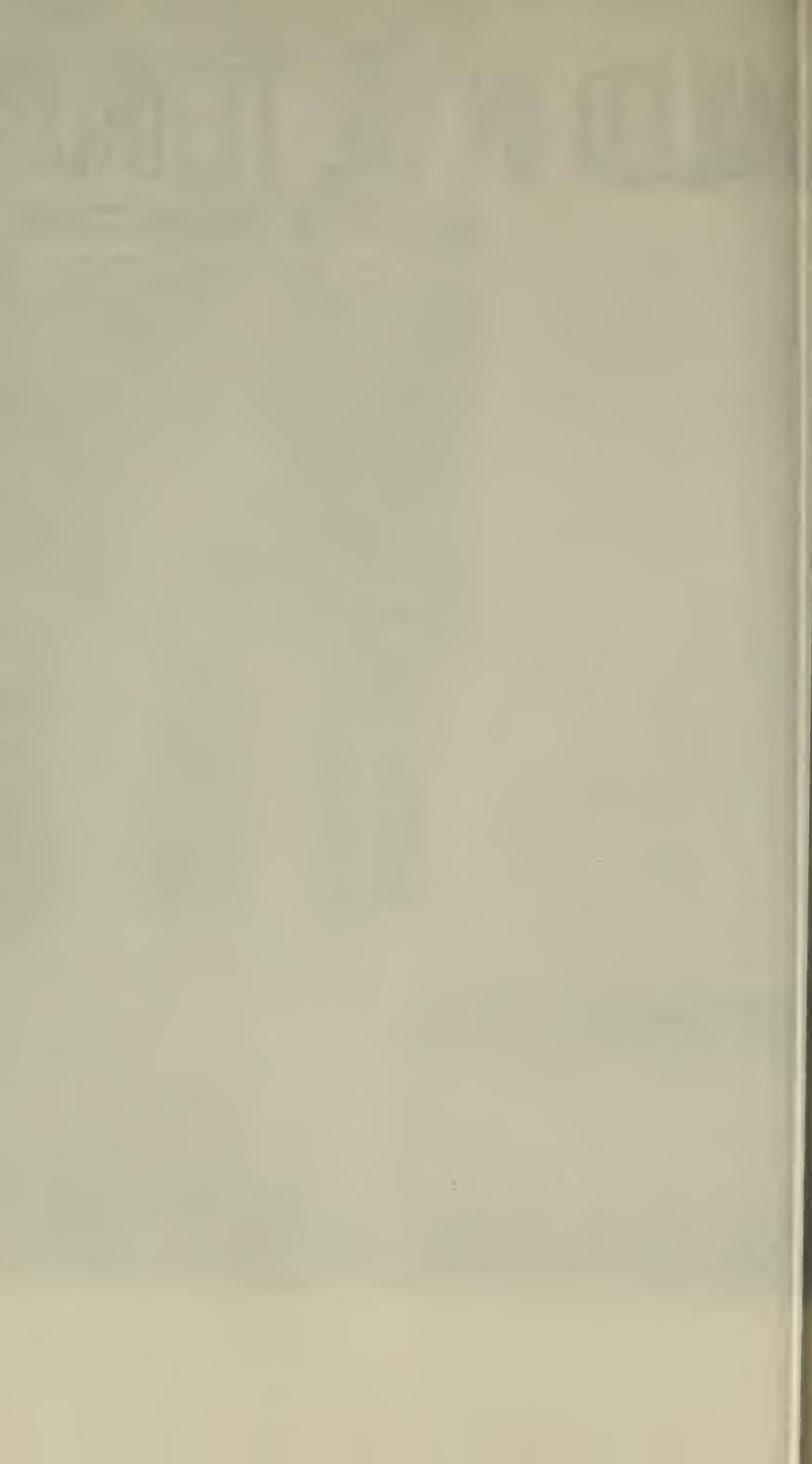
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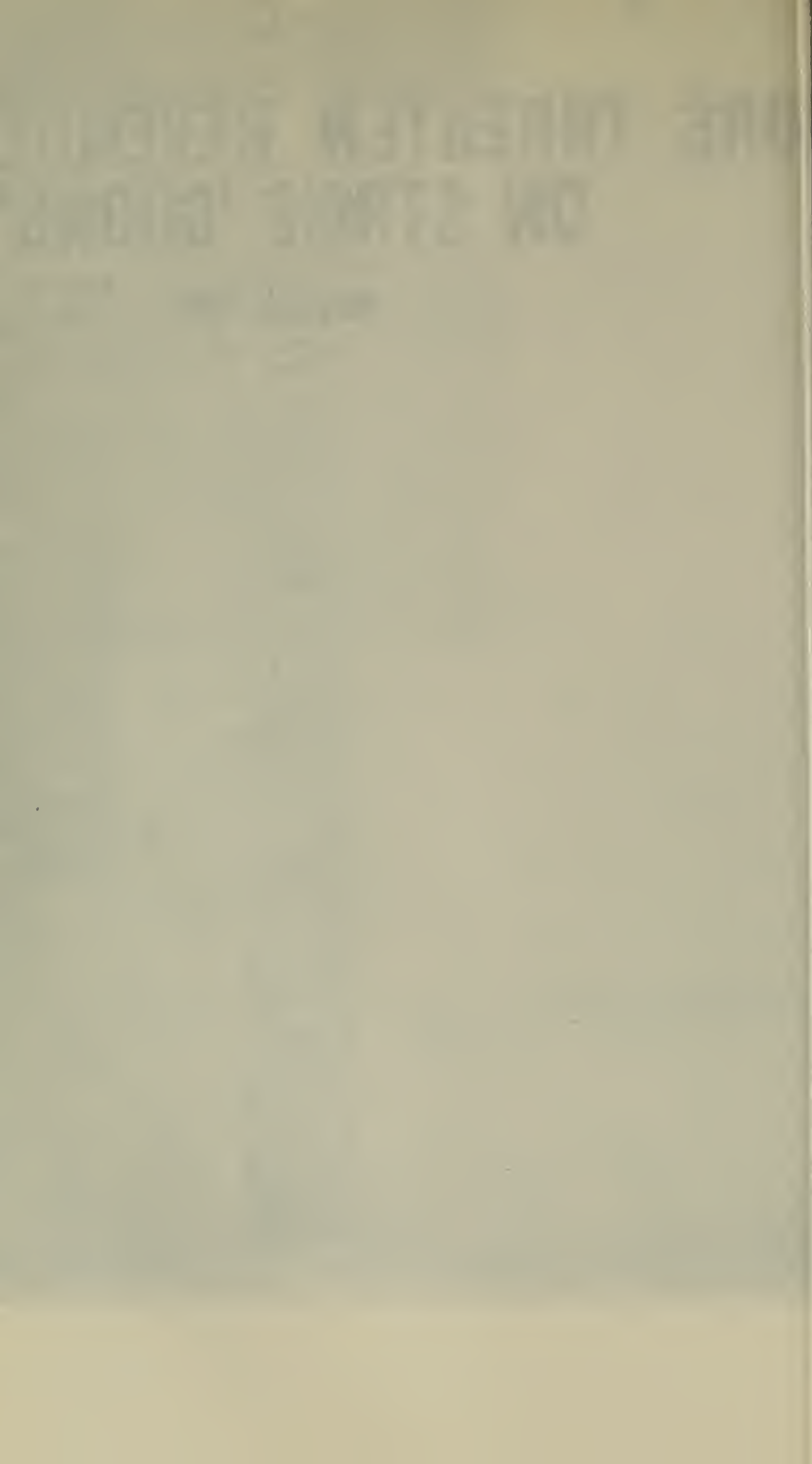


SEAFARERS THREATEN REVENGE ON STRIKE 'GOONS'

Seafarers Roiled
By Strike Attack

Beating of
Seaman Roils
Union Head

Special Oakland Tribune
October 26, 1948



As CIO, Firms Spar on Strike

[illegible]

☆ ☆ ☆

1. A Standard Oil company spokesman said this 600-mile-long pipeline is well beyond the best known oil and gas pipelines, known to be in good condition, because it is based on modern science to the design and five day work. He said the work takes in the pipeline from January 1, 1960, as well as in a pre-1960 figure of 1959, the only time that pipeline was in good condition.

Representatives of AFL, CIO, NAACP, and the War Relocation Authority back-handed to out-
right stated in newspaper's
headlines in the regional office of
WFLA at San Francisco, of which
the date for a bargain-
ing session of the National Re-
lationship Council.
President Murray has called
on all 100 nations in the world
to back the old wartime with
possibly moral and financial

More than 100 delegates representing 12 nations and 100 countries met in the UN's World Court in The Hague.

He is a member of the
and turned a Labor Ad-
for the Old Union.

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... of James Thomson, in

4. A. J. King, chief of Police E. F. Phelps, said a reported offer by

... a single, dovetailing, process of the US Government, to provide authorized all working persons to maintain police has not been directed to him.

It is important to remember that the results of the study are based on self-reported data. This means that the results may be influenced by factors such as social desirability bias or recall bias. However, the study's findings are consistent with previous research on the topic, which adds to the study's validity.

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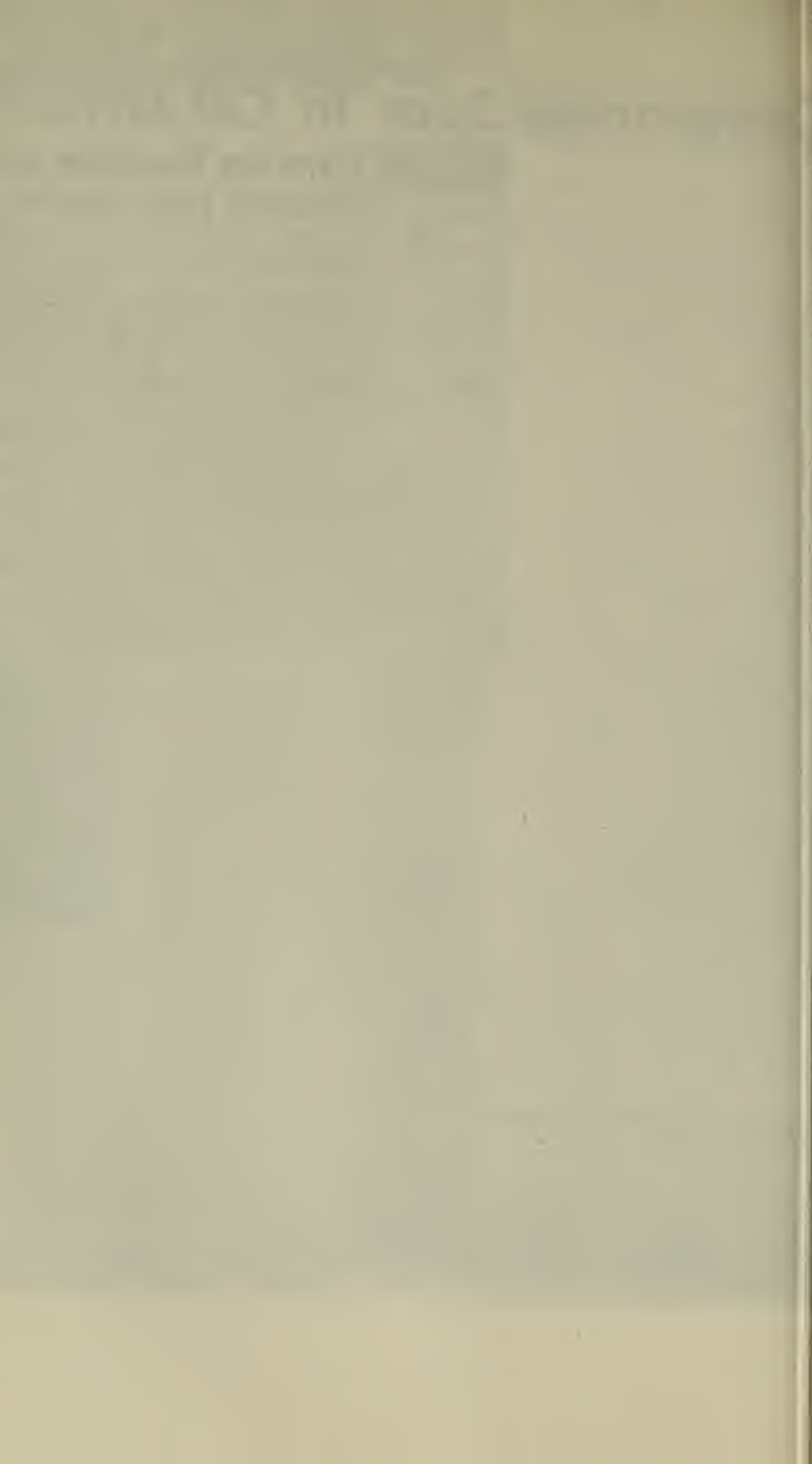
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(Continued from Page 7)



The newspapers shown in Respondent's Exhibit No. 92 were circulated generally in the community in which the Company's refinery is located (R. 4370-4371). The exhibit was offered not as proof of the facts therein reported but to show the effect on the community, the workers in the refinery and their families of the unlawful acts established by evidence already in the record (R. 4371). Upon identification of the papers constituting the exhibit and the offer in evidence, the following objection was made (R. 4371):

"Trial Examiner Myers: Any objection to that exhibit going in evidence?"

Mr. Law: Yes, indeed.

Trial Examiner Myers: I will sustain the objection."

We submit that the ruling was clearly erroneous.

In spite of the Board's refusal to admit such background evidence, the record sufficiently shows the general lawlessness which preceded these discharges to destroy any possible basis for assuming the discharges were for lawful activities.

In many of the incidents here there was no showing of any activities which the complainants would concede were strike activities having any connection with the discharges. Under the "Third" point of our argument we review the particular incidents with which the various complainants were connected. For example, the Company discharged nine of the complainants as the result of a predawn assault on workers attempting to come to work over a back road,²⁴ and discharged another group because

²⁴See "Yacht Harbor assault on October 12th," *infra* p. 74.

of an ambush after midnight.²⁵ All of the complainants involved testified. In each case they, as well as the General Counsel, realized that they could make no claim that these gatherings under cover of dark at these remote places constituted any phase of lawful protected activity. It was obvious that the circumstances were such that no lawful strike activity was conceivable.

In these instances, as with other incidents in the record, there is no evidence of any kind that any complainant was discharged for other than his evident connection with the assault, or ambush, as the case may be. There is no evidence of any kind that the Company was concerned in any way in reaching its decision to discharge with whether the assailants were strikers, nonstrikers, or mere hoodlums using the strike atmosphere as cover for vicious sky-larking, which in fact the circumstances seemed to indicate. This does not constitute a showing that the Company discharged the strikers for lawful strike activities. Only by accepting the Company's evidence that the purpose of the predawn rendezvous, the ambush, and the midnight patrols was to intimidate and assault employees going to work, can there be any findings that those complainants were discharged for acts connected with the strike. Whether the discharge of the complainants for their part, whatever it was, in the assault and the ambush was just or unjust, fair or unfair, there is no showing on which to base a finding that the Company discharged anyone for lawful strike activity.

²⁵See "Ambush on Winehaven Road on October 25th," *infra* p. 84.

We submit that the "showing" upon which the Board relies to shift the burden of proof is pure assumption. We further submit that under no theory can such an assumption satisfy the requirement of proof by "the preponderance of the testimony" or "substantial evidence on the record considered as a whole." Finally we submit that with any consideration at all of the voluminous evidence of violence and disorder the assumption becomes wholly untenable.

2. THE BOARD ERRED IN HOLDING THAT THE MISCONDUCT OF ECONOMIC STRIKERS IS AN AFFIRMATIVE DEFENSE AND REINSTATEMENT DEPENDS ON WHETHER THE MISCONDUCT WAS "SUFFICIENTLY SERIOUS."

In support of the Company's right of discharge we have pointed out that the strikers involved were economic strikers, and there is a complete lack of evidence of any hostility to the Union. The cases we have cited apply to this situation. The fundamental error of the Board has been in applying to this case principles of law applicable only to unfair labor practice strikers discharged in furtherance of the unfair labor practice and to admittedly discriminatory discharges where the employer seeks to avoid on special grounds the application of the normal remedy of reinstatement. In those situations reinstatement is predicated on a proved unfair labor practice.

The Board says in its decision (R. 224) "As we have noted, misconduct is an affirmative defense. Section 10(c) [of the Act] does not operate to overturn the well-established principle of law that the burden of establishing an affirmative defense is on the party alleging it."

What the Board is relying upon is a principle which is set out in its own Third Annual Report, published in 1939. At page 211 of the report it is stated:

“In several cases *involving discriminatory discharges, or strikes caused or prolonged by unfair labor practices*, the contention has been advanced that because of violent or unlawful conduct on the part of the employees involved the Board ought not to require their reinstatement * * *. In cases of serious offenses, it has withheld orders for the reinstatement of the guilty individuals. But where the misconduct is not grave * * * the Board has usually required reinstatement.”

That principle does not apply to this case where the primary issue is whether or not the employer has committed an unfair labor practice.

(a) The Board misconceives the issue to be decided.

Primarily there are two questions submitted for decision in cases such as this: (1) Has the employer committed an unfair labor practice which entitles the employee to the remedy of reinstatement? and (2) Will the granting of the remedy effectuate the policies of the Act or has the employee so conducted himself as to forfeit his right to reinstatement?

This court as early as 1938 correctly stated the rule in *National Labor Relations Bd. v. Carlisle Lumber Co.* 99 F.2d 533, cert. den. 306 U.S. 646, when it said (p. 537):

“A condition of reinstatement is that the employer must have been guilty of an unfair labor practice. * * * Another condition is that the affirmative action must be such as will effectuate the policies of the act.”

In this case the Board has passed over the first question with an assumption, and its findings deal solely with the second question.

The Board's misconception of the issue to be determined is revealed at the outset of the Intermediate Report. In the statement of the background of the controversy there is a finding that shortly before the discharges the Company told the Union that the Company "would agree to immediately reinstate all the strikers who, in its opinion, had not engaged in any acts or conduct during the strike *which would deprive them of their statutory right to reinstatement*" (R. 243, emphasis added). In the absence of an unfair labor practice there is no such statutory right.

There is no evidence that the Company's spokesman made the statement referred to. The purported finding is based upon the testimony of the Union secretary, that the Company's representatives told the Union that "they felt that there were certain things that had happened which, in their mind, made it necessary for them not to rehire certain people" (R. 469) and "that they would take practically everyone back to work except for those people who they felt had engaged in certain activities which they didn't consider were good for an employee of the Company to engage in" (R. 472).

According to the evidence the Company's spokesman told the Union that the Company expected to reinstate all strikers except a few who would be denied reinstatement, not because they belonged to the Union nor because they went out on strike, but because they did things the

Company felt no employee should do. This was the Company's right under the law. The Company did not tell the Union, and there is no evidence that the Company told the Union that it would reinstate all the strikers except those who had committed acts "which would deprive them of their statutory right of reinstatement." The Company had no such obligation under the law to the complainants as economic strikers and made no such agreement with the Union.

The distinction between the transcribed testimony and the Board's version of this incident is the key to the Board's treatment of the evidence in its findings. The Board has assumed that the strikers here involved have a statutory right of reinstatement unless deprived of that right by conduct which no longer fits them for employment. Unfair labor practice strikers may have such a right. *But these complainants were admittedly economic strikers.* As this court said in the *Carlisle* case: "A condition of reinstatement is that the employer must have been guilty of an unfair labor practice." The Board assumed that the Company was guilty at the outset of the case without reference to the facts proved.

This is not a case where the employer, admittedly having committed an unfair labor practice, seeks to defeat the employee's normal remedy of reinstatement. The question to be decided before any question regarding remedy could arise is whether the Board's General Counsel has proved by a preponderance of the evidence that the complainants were discharged not for misconduct but for lawful strike activity.

In support of the proposition that the misconduct of complainants in this case is an affirmative defense on which the Company has the burden of proof and that reinstatement depends upon the seriousness of the misconduct the Board relies on its 1944 opinion in the *Mid-Continent Petroleum Corporation* case (54 NLRB 912).²⁶ The *Mid-Continent* decision, although concerned with economic strikers, purports to follow *Labor Board v. Fansteel Corp.* (1939) 306 U.S. 240, dealing with unfair labor practice strikers. The Board later justified this by noting that the *Mid-Continent* decision was predicated on the fact that "the employer in effect conceded that certain strikers were being penalized for their strike activities."²⁷ There is no such concession in this case (R. 459-460).

²⁶R. 222.

²⁷*National Grinding Wheel Company, Inc.* (1948) 75 NLRB 905, 908.

The *Mid-Continent* case, according to the dissenting opinion in the *National Grinding Wheel Company* case, states a "decisional policy" underlying which "was the almost conclusive presumption predicated upon the accumulated experience of this Board" (R. 538).

With the express purpose of avoiding decisions based upon such "expert" inferences, Congress provided in section 10(c) of the Labor Management Relations Act of 1947 that the Board should base its decisions "upon the preponderance of the testimony." In the Conference Report on the Act (U.S.C. Cong. Serv., 80th Cong., 1st Sess., 1947), referring to section 10(c), it is stated (p. 1160):

"The conference agreement provides that the Board shall act only on the 'preponderance' of the testimony—that is to say, on the weight of the credible evidence. Making the 'preponderance' test a statutory requirement will, it is believed, have important effects. For example, *evidence could not be considered as meeting the 'preponderance' test merely by the drawing of 'expert' inferences therefrom*, where it would not meet that test otherwise" (emphasis added).

And (p. 1162):

"The language [of the Act] * * * precludes the substitution of expertness for evidence in making decisions."

Further, it should be noted that the so-called statement of principle in the *Mid-Continent* case was mere dictum, as there was no order of reinstatement and the complaint was dismissed.

- (b) The cases relied upon by the Board involve unfair labor practice strikers discharged in furtherance of the unfair labor practice.

Labor Board v. Fansteel Corp. (1939) 306 U.S. 240 is the leading case on the refusal to reinstate strikers even though they have been victims of an employer's unfair labor practice. In that case the Board had found that the employer had openly refused to bargain and had "engaged in a consistent program, developed along varied lines, of both open and underhanded attack upon the efforts of its employees to exercise their right to self-organization."²⁸ Upon this ground the Board ordered the employer to reinstate with back pay all strikers. The Supreme Court did not question the finding of unfair labor practice. It nevertheless set aside the Board's order of reinstatement because the strikers had engaged in unlawful conduct, i.e., a sit-down strike. In its opinion the Court said (p. 255):

"We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work."

²⁸5 NLRB 930, 939.

Where the employer's unfair labor practice has caused the strike as in the *Fansteel* case or where the employer's unlawful discrimination is conceded as in the *Mid-Continent* case the misconduct of the complainants may be a matter of affirmative defense. The defense is in the nature of confession and avoidance. That is not the situation here. There is no evidence that the employees here struck because of any unfair labor practice or fault of the Company.

The question of whether *unfair labor practice* strikers should be reinstated or whether the misconduct of such strikers was sufficiently serious to render the normal remedy of reinstatement inappropriate has been before the courts a number of times.

See:

National Labor Relations Bd. v. Stackpole Carbon Co. (3 Cir. 1939) 105 F.2d 167, where the Board had found that the employees had struck "as a direct result of the respondent's unfair labor practices" (p. 175).

Republic Steel Corporation v. National Labor R. Bd. (3 Cir. 1939) 107 F.2d 472, where the Court said (p. 478): "The causes of the strike remain the unfair labor practices * * *."

National Labor Relations Bd. v. Elkland Leather Co. (3 Cir. 1940) 114 F.2d 221, where the Court found that the strike was caused by the unfair labor practices of the Leather Company.

Southern S. S. Co. v. Labor Board (1942) 316 U.S. 31, where seamen who struck because of the employer's refusal to bargain were held properly discharged.

Of particular interest is *National Labor Rel. Board v. Clinchfield Coal Corp.* (4 Cir. 1944) 145 F.2d 66, which is cited by the Board (R. 223). In that case the Board had found "that the strike was caused by the unfair labor practices of the employer." The Court, without disturbing this finding, said (p. 73):

"But, even so the strikers were not justified in interfering with the Coal Company's possession of its own property and when they overstepped the bounds they furnished lawful grounds for their discharge."

In another part of the opinion (p. 72) the Court, in the *Clinchfield* case quotes the Board as saying:

"The Trial Examiner did not consider the evidence of the alleged misconduct of the discharged employees which was not reported to General Manager Adams or which allegedly occurred after their discharge, on the theory that such misconduct 'could have had no bearing upon the discharge.' In our opinion, however, such evidence is relevant in determining the remedy to be adopted. We have considered all of the testimony with regard to the alleged misconduct of these employees and find nothing in their behavior which would lead us *to vary or deny the normal remedy of reinstatement with back pay*" (emphasis added).

In that case the Board had in mind the distinction, which we urge here, between determining whether an unfair labor practice had been committed and whether the normal remedy should apply.

These are the cases upon which the Board and its attorneys rely (1) to justify placing the burden of proof on the Company, and (2) to justify a distinction between more and less serious misconduct in determining rein-

statement. They relate in each case to unfair labor practice strikers discharged in furtherance of the unfair labor practice or employees admittedly discriminated against unlawfully. Furthermore, they clearly make the distinction between the two problems of determining the lawfulness of the discharges and the appropriateness of the remedy of reinstatement.

- (c) In the absence of an unfair labor practice, reinstatement does not depend upon the "seriousness" of the employee's misconduct.

Applying the "more or less serious conduct" test derived from the above noted cases the Board here has segregated 43 from the group discharged and ordered their reinstatement, ignoring the fact that a "condition of reinstatement is that the employer must have been guilty of an unfair labor practice."²⁹

For example, in ordering reinstatement of the complainant Ottino, the Board says his conduct "was not of such a serious nature" (R. 217). Such reasoning as applied to economic strikers has been rejected repeatedly by the courts.

In *National Labor Relations Board v. Indiana Desk Co.* (7 Cir. 1945) 149 F.2d 987, the Court reviewed a decision of the Board (56 NLRB 76) in which it said regarding the discharged strikers (p. 79):

"* * * their conduct involved no serious acts of violence, and no arrests were made by the local police authorities. Such disorder, although not condoned by us, can normally be expected in any extensive

²⁹*National Labor Relations Bd. v. Carlisle Lumber Co.* (supra) 99 F.2d 533, 537.

strike, and is no warrant for a denial of reinstatement.”

The Court observed that the record was “silent as to any antiunion background.” That is true in this case. The Court then said (p. 995):

“Neither do we think, as the Board seems to imply, that the misconduct of the picketers should be measured by the amount of violence which occurred.

* * * * *

To hold that the striking employees in this case are entitled to be reinstated, some of them with back pay, is to put a premium upon their misconduct and to encourage like conduct on the part of others.”

Similar criticism of the Board’s view is found in *Wilson & Co. v. National Labor Relations Board* (7 Cir. 1941) 120 F.2d 913, where the Court said (p. 924):

“There runs through the Board’s argument the covert suggestion that the unlawful activities were of such minor character that the participants were not deprived of any rights under the Act. Respect for law and order demands the repudiation of such a suggestion. The effect of an unprovoked assault cannot be made dependent upon the size of the club with which it is committed.”

See also:

National Labor Rel. Bd. v. Reynolds Internat. Pen Co. (7 Cir. 1947) 162 F.2d 680;

National Labor Rel. Bd. v. Perfect Circle Co. (7 Cir. 1947) 162 F.2d 566;

National Labor Rel. Bd. v. Wytheville Knitting Mills, Inc. (3 Cir. 1949) 175 F.2d 238;

Maryland Drydock Co. v. National Labor Rel. Bd.
(4 Cir. 1950) 183 F.2d 538.

In considering the propriety of discharges the question is not whether they were merited or unmerited or just or unjust, nor whether as disciplinary measures they were mild or drastic, since the question as to proper discipline is a matter for management discretion. The Board is limited, in a case such as this, to the question of whether or not the employees were discharged for lawful union activities.

National Labor Relations Bd. v. Montgomery Ward & Co. (8 Cir. 1946) 157 F.2d 486, 490;

National Labor Relations Board v. Mylan-Sparta Co. (6 Cir. 1948) 166 F.2d 485, 491.

Originally, in considering the discharge of economic strikers, the Board seems to have made an effort to apply the rule established by the courts. For example, in *Decatur Newspaper, Incorporated* (1939) 16 NLRB 489, the Board first found that the strike, like the strike here, "was not caused or prolonged by unfair labor practices of the respondent," and then said, "We also find that the respondent had reasonable grounds for believing that Severt and Lewis engaged in the assault. Under the circumstances of this case we hold that such refusal [to re-employ] did not constitute a violation of section 8 (1) or (3) of the Act."

In 1944, however, in *Mid-Continent Petroleum Corporation*, 54 NLRB 912, as we have seen, the Board misinterpreted the *Fansteel* case.

The Board next attempted to apply the affirmative defense principle to the discharge of economic strikers in *The Perfect Circle Company* (1946) 70 NLRB 526, quoting the dictum in the *Mid-Continent* case. In *National Labor Rel. Bd. v. Perfect Circle Co.* (7 Cir. 1947) 162 F.2d 566, the Court reversed the Board order of reinstatement. In that case four pickets stood in or near the path of the Company's manager as he attempted to enter the gate to the plant. When they would not step aside, he left. The Board held that although the circumstances may have given the manager reason to believe he was barred under threat of violence, this was not sufficient under the *Mid-Continent* principle. The Circuit Court disagreed strongly with the Board's view of the evidence but bowed to its findings under the limited power of review granted the courts prior to the 1947 amendments to the Act.³¹ It held, however, that regardless of the employees' intentions or motives "they barred the management out of the place" (p. 573) and this justified discharge.

In 1947, in Congress, the House Committee handling the bill which became the Labor Management Relations Act of 1947 severely criticized the Board's policy and reported:

"In cases involving violence in strikes, the Board has seemed reluctant to follow the decisions of the courts. It is inclined to reinstate, with back pay, strikers whom employers discharge for what the Board seems to regard as minor crimes, such as interfering with the United States Mail, obstructing

³¹See *Universal Camera Corp. v. NLRB* (Feb. 26, 1951) 95 L.Ed. 306.

railroad rights-of-way, discharging firearms, rioting, carrying concealed weapons, malicious destruction of property and assault and battery.”³²

After the enactment of the Labor Management Relations Act of 1947 the Board again made a greater effort to follow the court decisions and on July 30, 1947, in *Underwood Machinery Company*, 74 NLRB 641, the Board, in effect, abandoned the principle of its *Mid-Continent Petroleum Co.* case and held at pp. 646-647:

“* * * in view of the finding that actually a union-sponsored slowdown did not take place, the issue posed is whether it is an unfair labor practice for an employer to discipline an employee in the mistaken belief that he has engaged in an unprotected type of concerted activity. We do not think that punishment visited in the ordinary course of operations because of the mistaken belief that the employee was engaged in unprotected activity can be said to have the purpose or effect of discouraging union membership or legitimate union activity. Because it may be unfair does not make it discriminatory.”

In *Augusta Chemical Co.* (1949) 83 NLRB 53, the Board considered the discharge of an employee who, during a strike, told a job applicant he better not go to work because, he said, “You might get hurt.” The Board held (p. 73):

“‘An employer may if it wishes, in applying plant discipline, impose restrictions on its employees’ conduct which, although of a relatively severe nature, are not violative of the Act unless they inter-

³²Legislative History of the Labor Management Relations Act, 1947, Vol. I, p. 318.

fere with the right to engage in concerted activities guaranteed by Section 7 of the Act or discriminate with respect to employment because of union activities. * * *

Management chose to regard this incident as intimidation of an employee which went beyond the bounds of normal free discussion among employees. *As this reason does not constitute, upon all the credible evidence, a pretext for discriminatory motive in effecting the discharge, Respondent's conduct, although somewhat heavy handed, cannot be held violative of the Act'*'' (emphasis added).

See also the Board decisions in the margin.³³

³³In *Atlanta Broadcasting Co.* (1948) 79 NLRB 626, in considering a charge of discriminatory discharge, the Board said (p. 627):

“ ‘As to Fenster, the Union concedes in its brief that he was at fault in failing to make the newscast. It contends, however, that Fenster's misconduct was not the real reason for his discharge. As to Lurie, it contends that there is no credible evidence to support a finding that he was guilty of any dereliction of duty. However, *the issue is not whether Fenster and Lurie were actually guilty of misconduct, but whether Speight believed that they were, and discharged them for that reason'* ” (emphasis added).

In re *Des Moines, Springfield and Southern Route* (1948) 78 NLRB 1215, the Board said (pp. 1218-1219):

“ * * * Purscell's discharge was not in violation of the Act. The record supports the conclusion that his discharge stemmed not from the Respondent's antipathy to his union activity in this instance, but from a desire to prevent disruptions in the orderly operation of its business. The precipitating cause, as far as Manager Arnold Fletcher was concerned, was the altercation with Burrhus. This is true even though we find, as did the Trial Examiner, that Burrhus was the aggressor. And, although this incident was provoked by the use of the word 'scab,' we are persuaded that it was regarded by Arnold Fletcher as a fortuitous circumstance of the case. *The record shows that he apparently in good faith concluded, although erroneously, after investigation, that Purscell struck the first blow'* ” (emphasis added).

These Board decisions correctly state the controlling principles of law as established by the courts.

In the fall of 1950, however, we find the Board, in this proceeding, reverting to its pre-1947 policy regarding the reinstatement of strikers, rejecting the clearly defined intent of Congress, and again refusing to follow the decisions of the courts.

When the issue is whether or not the employer has committed an unfair labor practice, as in this case, there is absolutely no authority in the law today for the proposition that misconduct is an affirmative defense on which the employer has the burden of proof and reinstatement depends upon whether the misconduct was "sufficiently serious." The law is otherwise. As a condition of reinstatement the Board must prove that the employer has been guilty of an unfair labor practice. The Board failed to prove that fact here, and its order of reinstatement must be set aside.

THIRD: EVEN ON THE ERRONEOUS THEORY THAT THE COMPANY HAD THE BURDEN OF PROVING THAT THE COMPLAINANTS WERE DISCHARGED FOR OTHER THAN LAWFUL STRIKE ACTIVITIES, THE PREPONDERANCE OF THE EVIDENCE CLEARLY ESTABLISHES THAT THE CONDUCT OF THE COMPLAINANTS WAS UNLAWFUL, IMPROPER, AND UNPROTECTED, AND THAT THE COMPANY WAS AMPLY WARRANTED IN DISCHARGING THEM FOR OTHER THAN LAWFUL STRIKE ACTIVITIES. EVEN ON THIS THEORY, THEREFORE, THE BOARD'S ORDER OF REINSTATEMENT IS ERRONEOUS AND MUST BE SET ASIDE.

Whether or not the Board proved or was relieved from proving the commission of an unfair labor practice, the

Company refuted any possible assumption of violation of the Act or inference of unlawful motive or purpose in discharging the complainants. The Company proved by a preponderance of the evidence that the cause of discharge in each case was other than lawful strike activity. We here review the evidence of the particular vandalism and unlawfulness which led to the discharges and the connection of the respective complainants with the occurrences. In themselves they constitute a remarkable pattern of lawlessness. We submit, however, that if the Company's judgment is to be evaluated the conduct of the individual complainants must be viewed in the atmosphere of continued violence in which it occurred and not in isolation as the Board viewed it.

1. MASS DEMONSTRATIONS AT THE ADMINISTRATION PARKING LOT—COMPLAINANTS HERE INVOLVED: ANSCHUTZ, BORREANI, EMMANUELE, GILLESPIE, GROTHUES, HAMMON, HIGGINBOTHAM, HOLLIS, McLAUGHLIN, NELSON, OGDEN, PETERSON, POLSON AND WYATT.

(a) The evidence on mass demonstrations.

For three successive days, October 4th, 5th and 6th, a mob gathered at the entrance and exit of the Administration or No. 14 Parking Lot at the refinery. A complete picture of the resulting disorder cannot be gained from oral testimony alone. In addition to the testimony of police officers and other impartial witnesses, the Company put in evidence numerous photographs and a moving picture film (Resp. Exh. 43). These pictures, as we have noted, were taken after the first day of disorder to secure evidence of violation of and enforcement of the state court restraining order. The film of which 463 feet (Resp. Exh. 43a) are devoted to scenes at the parking lot

on October 5th and 6th, gives probably the best over-all picture of what happened. In the violent mob action portrayed in these exhibits, it is rarely possible to follow the action of particular individuals except momentarily. In many cases, identification of complainants as members of the mob is all that was possible.³⁵

Events at the parking lot on October 4th.

On October 4th a crowd of strikers gathered at the parking lot because, according to the picket leader, it was reported that men were going through the lot to work in the refinery laboratory and "they wanted to stop them" (R. 3081). Seven of the complainants were identified by the Company as participants and each of them admitted being present. They were Emmanuele (R. 824), John Gayanich (R. 632), Hollis (R. 1917), Peterson (R. 1148), Rothacher (R. 923), Selle (R. 878), and Wyatt (R. 1052). Pickets tried to stop cars from going into the lot, but most of the cars eventually entered (R. 3084).

³⁵The Company introduced a number of photographs to establish the presence of particular individuals at the scene. As is common in mass picketing, the ebb and flow was between passive obstruction by stalling and the violent rushing and pushing of an assault (see Resp. Exh. 43). Not all of the still pictures, therefore, convey the threatening aspect of the milling crowd. Illustrative of his interpretation of such identification photographs is the trial examiner's comment regarding Respondent's Exhibit 9 that, "The picture depicts complainant Anschutz with his hands in his pockets leisurely walking across the entrance of the parking lot apparently to ascertain why a police officer was holding a man by the arms. * * * [and] reveals that he was doing nothing more than a reasonable person would do under like circumstances" (R. 260). Actually the picture shows an automobile waiting to enter the parking lot while the police attempt to clear the way by physically removing a group of the complainants standing, stalling and "leisurely walking" directly in front of the automobile. Appearing in the picture with Anschutz, and also "with his hands in his pockets," is the complainant Meindersee. Meindersee had a large rock in his pocket (R. 374).

Emmanuele testified that he and others stood in the entrance to the parking lot and were pushed out of the way by the police to let the cars enter (R. 824-827). Wyatt also admitted being one of the pickets at the entrance to the parking lot that morning (R. 1052). Selle said there was a gathering of from 50 to 75 people (R. 879). Peterson admitted walking around in the crowd (R. 1154).

The evidence shows that Alice Woods, an employee, on her way to work was prevented from driving into the lot by Gayanich and two other pickets who stood in the driveway (R. 2877, 2883). Gayanich carried a dark object in his hand (R. 2879) and told Miss Woods, "You are not coming in" (R. 2881). The other two pickets carried rocks in their hands (R. 2878). They were identified as complainants Hollis and Rothacher (R. 633, 638). After some minutes the employee abandoned her attempt to enter the parking lot and drove away (R. 2884). The complainant Hollis, who was identified by Gayanich as one of the pickets who, Miss Wood testified, was armed with rocks, admitted being in the picket line at the time (R. 1922).

On the same morning Gayanich and the others prevented another employee, Virginia Humphrey, from going to work, by blocking the sidewalk, calling her vile names, pushing her into the street and threatening her (R. 2852-2856).

The only property damage done on the morning of October 4th was the breaking of windows in two police cars (R. 3082-3083).

Events at the parking lot on October 5th.

On the next morning, October 5th, a larger group gathered at the parking lot (R. 3088). Women, as well as men, were in the picket line (R. 3089). The acting Chief of Police called from 35 to 40 police officers to the scene (R. 3090). He asked for the captain of the pickets, showed him a copy of the court's restraining order (Resp. Exh. 40), and instructed him not to block the entrances (R. 3087). The women, who for the most part were wives of the complainants, stood in front of the cars attempting to enter the parking lot, and the police officers had to pull them out of the way to prevent them from being run over (R. 3089). Men in the group fought with police officers (R. 3090). Car windows were broken (R. 3091, 1876), employees driving into the lot were assaulted (R. 3808-3810), and employees attempting to walk through the lot were attacked (R. 3539-3540). The crowd blocked cars trying to enter the lot, and jostled and pushed around the driveway (R. 3460). Several arrests were made (R. 3090-3091, 3502-3503).

The seven complainants who had been at the parking lot the previous morning admitted being in the group that gathered there again on October 5th. These were Emanuele (R. 823), John Gayanich (R. 645), Hollis (R. 1922), Peterson (R. 1155), Rothacher (R. 928), Selle (R. 877) and Wyatt (R. 1051). These seven and complainants Anschutz, Gillespie, Hammon, Higginbotham, McLaughlin, Meindersee, Nelson, Polson, W. L. Vetter and Vandegrift were identified by the Company in the group and charged with contempt of court in the injunction proceedings (Resp. Exh. 81, 83; R. 4362). Of this latter group, the fol-

lowing admitted being present: Anschutz (R. 1827-1828; Resp. Exh. 9), Hammon (R. 2508), Higginbotham (R. 1020-1021; Resp. Exh. 5), McLaughlin (R. 739), Meindensee (R. 1188), Nelson (R. 2214), and W. L. Vetter (R. 1939). Buford Vetter (R. 1870-1874) and Leighty (R. 2766-2770) also admitted being in the crowd. Only Gillespie (R. 1491) and Polson (R. 1040) denied being present. Vandegrift did not testify.

Events at the parking lot on October 6th.

On the third morning, October 6th, there was a crowd of at least 150 men milling around and trying to block cars from entering the parking lot (R. 3095). One witness estimated that there were from 200 to 300 people in the crowd (R. 1567). There was a "big battle" that morning, according to one of the complainants (R. 1371). The pickets refused to clear the entrance and the police had to remove them by force (R. 3095). Car windows were smashed. Six arrests were made but the police were unable to stop the disorder (R. 3096-3097). Eight police officers were injured, one received a fracture of the nose, and another was hit on the head with a club (R. 3113). Employees going to work were struck in the face (R. 3802). As the crowd moved down the street, some of the men overturned a parked car (R. 3791, 4451).

Eight of the complainants who were in the crowd at the parking lot the previous morning admitted being there again this morning. These were John Gayanich (R. 651), Hammon (R. 2511-2512), McLaughlin (R. 742-744), Nelson (R. 2214), Rothacher (R. 942), Selle (R. 885), W. L. Vetter (R. 1962) and Wyatt (R. 1058). Of the complainants, seven others were identified that morning and ad-

mitted being present, Borreani (R. 1371-1372), Brackin (R. 1558), Grothues (R. 979), Harwayne (R. 2476), Martinez (R. 1093), Ogden (R. 2634) and Wyrick (R. 2167). Five of these, Borreani, Brackin, Grothues, Ogden and Wyrick, were charged with contempt of court in the injunction proceedings (Resp. Exh. 81, 83). Brock also admitted he was present (R. 2572).

Each of the complainants, except Vandegrift, who was not available, was called by the Company and examined regarding these events. Their testimony consisted largely of hesitant denials, loss of memory, equivocal identification, and reluctant admissions.

It is inconceivable that a crowd of this type should have gathered at the parking lot on these particular mornings by pure coincidence. Many of the complainants were there not just once but two and three times contrary to the terms of a court order prohibiting mass picketing (Resp. Exh. 40). The photographic evidence of mob violence and the proof of repeated assaults and of extensive property damage make incredible any contention that these crowds were in the main nothing more than the gathering of innocent spectators and bystanders. Yet the complainants uniformly testified that they did nothing and saw nothing, and their inability to identify themselves or their acquaintances in the photographs was in most cases extraordinary (R. 1961, 836-837, 956, 1833-1834).

The motion picture (Resp. Exh. 43) and the testimony of many of the police officers present establish beyond question the incredible character of the complainants' strangely uniform testimony that no one did anything, and no one saw anything, and no one recognized anyone else.

(b) The evidence amply justified discharge.

The Company position is that mass picketing and mass obstruction of its gates is unlawful and, whether or not it was union inspired or the result of a preconceived plan, it was not a concerted activity protected by the National Labor Relations Act, as amended.

Any contention that mass picketing is a "protected" activity, even under the Wagner Act, prior to its amendment by the Labor Management Relations Act of 1947, was dispelled by the Supreme Court in *Allen-Bradley Local v. Board* (1942) 315 U.S. 740. In upholding a Wisconsin statute under which mass picketing was held unlawful, the Court said (p. 750):

"And we fail to see how the inability to utilize mass picketing, threats, violence, and the other devices which were here employed impairs, dilutes, qualifies or in any respect subtracts from any of the rights guaranteed and protected by the federal [Wagner] Act. Nor is the freedom to engage in such conduct shown to be so essential or intimately related to a realization of the guarantees of the federal Act that its denial is an impairment of the federal policy."

Of the fourteen employees here involved, twelve were convicted of contempt for their participation in these very activities and fined by the state court before the rendition of the Board's decision. It was precisely because of conduct which the state court found unlawful that the complainants in question were discharged (R. 4410). The Board argues that "an employer, who discharges a striker on the ground that he has engaged in unlawful strike activities, does so at the peril of deciding wrongly" (R. 223). We do not concede this to be the law, but if it is

we submit that when the employer is proved right by a court of competent jurisdiction, as it was in this case as to twelve of the fourteen complainants, an order of reinstatement is clearly erroneous. The view of the California Superior Court of Contra Costa County regarding these demonstrations is set out in its memorandum of decision (R. 147-153).³⁶

The Board ignores the over-all picture of mob action and mass picketing which impelled the Company to discharge the identified participants. On this part of the case the findings are limited to drawing fine distinctions based on the degree of individual participation in particular overt acts. This is done without reference to the setting in which the acts occur.

The Company pointed out to the Board that in its decision in *Socony Vacuum Oil Company, Inc.* (1948) 78 NLRB 1185, which involved a similar mass demonstration, it had held that the employer "was privileged to discharge or discipline any participant in such unlawful activity." To distinguish that holding the Board finds that "the strikers here did not gather at the gates pursuant to any plan to obstruct entry to or from the re-

³⁶See also: *In re Bell* (1942) 19 Cal.2d 488, 505:

"* * * Pickets may bring themselves to the notice of persons entering the picketed premises, but may not forcibly stop automobiles and intimidate the occupants by gathering in large numbers. Such action is more than peaceful persuasion. It is forceful intimidation and constitutes violence."

And:

Teller, *Labor Disputes and Collective Bargaining*, Vol. 1, p. 382, sec. 124:

"Excessiveness is everywhere held to affect the legality of otherwise lawful picketing. Picketing accompanied by violence, obstruction of the premises picketed (as in mass picketing) or false, insulting or misleading banners is accordingly held to be illegal everywhere."

finery, or any other illegal plan" (R. 220). We know of no statute or ruling which legalizes mass picketing or mass obstruction of an employer's gates merely because the participants gathered without a preconceived plan. There is no requirement that the Company establish premeditation or criminal intent. This contention by the Board was rejected by the Court of Appeals for the Seventh Circuit, in setting aside a Board order, in *National Labor Rel. Bd. v. Perfect Circle Co.* (7 Cir. 1947) 162 F.2d 566, 572-573. The Court held that intentions of strikers who bar entrance to their employer's premises are not determinative, because motives or good intentions cannot excuse such unlawful or improper conduct. Furthermore, as we have noted, the gathering of mobs in the entrance to this particular parking lot on three successive mornings could hardly have been a matter of chance.³⁷

The Board also states that "many of these strikers who are accused of being a member of a mob were merely observers who stood apart from those who gathered directly in front of Respondent's gates" (R. 221). If the reluctant testimony of the identified participants is taken at face value, every one of them, including the eleven whom the Board refused to order reinstated, were observers and innocent bystanders. Ogden, for example merely "wanted to go down and see what was going on" (R. 2644), but the police had to push him out of the driveway "more than

³⁷Regarding a similar situation the Court in *Goldfield Consolidated Mines Co. v. Goldfield Miners' Union* (C.C., D. Nev. 1908) 159 Fed. 500 said (p. 519):

"It is as unreasonable to suppose that these men assembled without design or concert among themselves, and without any direction or understanding with the union or its officers or committees, as it is to suppose that the wheels of a watch get into place by accident."

once" to clear the way for cars attempting to enter (R. 2636). The record shows that the mob surged back and forth across the entrance to the parking lot (Resp. Exh. 43; R. 1567, 2481). As might be expected with milling crowds of this size, the shoving and crowding extended back away from the parking lot as much as fifty feet to the bus stop, referred to as the "little green shack" (R. 1091-1092, 1874; Resp. Exh. 31, 41).³⁸

It has been held by the Board and by the courts that proof of overt acts of violence is not necessary to establish that mass picketing is illegal. In the *Socony Vacuum* case (78 NLRB 1185) there was neither an actual assault nor property damage.

See also:

The International Nickel Company, Inc. (1948) 77 NLRB 286;

National Labor Rel. Bd. v. Perfect Circle Co. (7 Cir. 1947) 162 F.2d 566, 573;

National Labor Relations Board v. Indiana Desk Co. (7 Cir. 1945) 149 F.2d 987, 995.

These decisions fully sustain the Company's right to discharge the participants in the mass demonstrations.

³⁸Some of the complainants admitted being pushed by and pushing the police as the police attempted to clear an entrance to the Company's property (Anschutz, R. 1831; Borreani, R. 1383; Emanuele, R. 826, 832; Hollis, R. 1923; McLaughlin, R. 744; Ogden, R. 2642). Others admitted moving around in the milling crowd (Harwayne, R. 2487; Martinez, R. 1092; Peterson, R. 1154; B. Vetter, R. 1874; Wyatt, R. 1057). Some admitted crossing or getting to the edge of the parking lot entrance (Braekin, R. 1567; Rothacher, R. 943; Selle, R. 880; W. L. Vetter, R. 1951). Others claimed they got no nearer than 8, 10, 15 or 20 feet from the center of rioting and the car smashing at the entrance to the parking lot (Grothues, R. 997; Higginbotham, R. 1024; Meindersee, R. 1190; Nelson, R. 2221; Wyrick, R. 2170). Only two, Gillespie and Polson, denied any participation (R. 1491, 1040).

The attempt by the Board to segregate the less violent from the more violent members of the mob in purported reliance upon the *Fansteel* case (supra, 306 U.S. 240) ignores the holding in that case that (pp. 260-261) "aiders and abettors, likewise guilty of unlawful conduct, are in no better case than the 'sit-down' strikers themselves."

As we have noted, all but two were admitted participants. Only Gillespie and Polson dispute their identification. We submit, however, that under the Board's own decisions no matter how the issue of fact is resolved there is no basis for finding a discriminatory or unlawful discharge. (See cases discussed, supra pp. 47 and 49 to 50, *Decatur Newspaper Incorporated*, 16 NLRB 489; *Underwood Machinery Company*, 74 NLRB 641; *Atlanta Broadcasting Co.*, 79 NLRB 626; and *Des Moines, Springfield and Southern Route*, 78 NLRB 1215). The evidence is undisputed that these two, like the others, were discharged solely on the basis of their identification as participants in the clearly improper and unlawful mass disorder. There is no evidence of any kind that any other factor entered into the consideration of the Company in the case of a single individual. We submit this is determinative of the issue here as to all fourteen of the employees involved in this phase of the case.

2. PURSUIT OUT CASTRO STREET ON OCTOBER 4TH—COMPLAINANTS HERE INVOLVED: DAUSY AND FRANK GAYANICH.

(a) The evidence on the pursuit out Castro Street.

Employees Raleigh Andrews and Andrew Brascresco came to work at the picketed refinery by climbing the fence along Castro Street between midnight and one o'clock on October 4th. During the strike, it was not un-

common for employees attempting to go to work to be followed and molested (R. 4364).³⁹ Myles James, who drove Andrews and Brascresco in his Plymouth sedan to the prearranged spot near the refinery, testified that "everyone in the city was terrorized" (R. 4204). He further testified that when they arrived at the refinery fence Andrews and Brascresco got out of the car "and went over the fence into the refinery"; that Janet Taylor (now Mrs. Andrews) and Walter Hohstadt were also in the car; that after Andrews and Brascresco alighted he proceeded for about a quarter of a mile along Castro Street, when Hohstadt told him that "a picket's car took out after us" and it "was following us" (R. 4195). Hohstadt testified (R. 4219-4220):

"* * * we were more or less a little leery of whether the pickets would take out after us and if they caught us, well, we more or less had an idea of what would happen because, well, I watched one of their outbreaks of violence. I was up on a hill and watched them when the police had to resort to tear gas."

James further testified that he increased his speed; that he then noticed three other cars behind him; that he increased his speed again; that one car kept flashing a spotlight in his rear-view mirror making it difficult to drive; that a station wagon came up from behind on the right; that he tried to keep ahead of the station wagon; that the two cars collided and his car went into the ditch (R. 4196-4197). Mrs. Andrews and Hohstadt testified to substantially the same facts.

³⁹See Resp. Exh. 92 [rejected].

The station wagon was being driven that night by the complainant Dausy accompanied by complainant Frank Gayanich. Dausy denied he was chasing the James car and testified that he tried to pass that car and speeded up to go by on the left; and that he remembers nothing further until he woke up in the hospital (R. 1724-1728). Complainant Frank Gayanich's testimony was substantially the same.

Elbert O. Sherwood, an employee working in the refinery, testified that from inside the refinery fence that night he saw Andrews and Brascresco arrive in the Plymouth at the refinery and in fact that he was at this point inside the refinery by prearrangement to assist Andrews and Brascresco in getting over the fence. At that time Sherwood saw a station wagon, a black Buick and a third car take out after the Plymouth and, on Sherwood's urging, Andrews telephoned the police from inside the refinery "that those guys are chasing them" (R. 4090-4091).

Police Lieutenant Bacon testified that about this time he received a message over the police radio "that there was a car being chased north on Castro Street * * *" (R. 3609-3610, 3613), that in answer to this call he proceeded in a police car toward the north end of Castro Street, and that just before reaching Castro he saw a black Buick sedan traveling in the opposite direction at a high rate of speed (R. 3615-3616; General Counsel's Exh. 6). Officer Rodden, in another car, also heard on the police radio "a report of several autos following a green Plymouth sedan north toward North Richmond" (R. 4168) and he also proceeded toward the vicinity of Castro.

From this evidence, there can be no doubt that after leaving the vicinity of No. 1 Gate the Plymouth was chased or followed by several cars north on Castro Street, and that the testimony of James, Mrs. Andrews and Hohstadt regarding the events that transpired immediately prior to the accident is substantially in accord with the facts.

Lieutenant Bacon also testified that after the accident he interviewed the complainant Frank Gayanich at the hospital and asked him how the accident happened and that Gayanich replied that "he was chasing a car" (R. 3620). On cross-examination Officer Bacon testified that he could not "remember whether he said 'chasing' or 'following' " (R. 3644).

That the accident followed an unlawful chase seems hardly questionable in view of what happened immediately after the collision. After the Plymouth turned over beside the road, the occupants, in fear of pursuit, ran into an adjacent swamp area (R. 4197, 4209, 4216). Immediately a crowd of men got out of arriving cars and followed James, Mrs. Andrews and Hohstadt into the swamp screaming threats (R. 3622) and shouting, "Get the sons of bitches. Get them out of there, those scab strike breakers" (R. 4171), "Let's go over to the Union Hall and get some more men" (R. 4210), and "We will get you scabs" (R. 4217). The police warned the three victims to remain hidden because they were unable to protect them from the pursuing mob (R. 3623, 4217). The police finally assisted the victims to escape to the rear of the swamp (R. 4211, 4217-4218, 4172-4173).

In view of these developments, it is inconceivable that this was an ordinary accident between two cars alone

on the road as Dausy and Gayanish testified (R. 1607, 1608, 1720-1721, 1728). The arrival at this hour of the night of a crowd of pursuers at the scene of the accident at almost the instant it occurred (R. 3618) is explained only by the fact that the Plymouth was chased down Castro Street by several cars, with Dausy's station wagon leading the chase (R. 4196-4197, 4215-4216). Those who pursued James, et al., into the swamp with shouts of "scab" and "strike breakers" had obviously, along with complainants Dausy and Gayanich, followed the Plymouth from the place near No. 1 Gate where Andrews and Brascresco jumped over the fence to go to work.

(b) The evidence amply justified discharge.

The findings of the trial examiner, adopted by the Board, were that "Dausy and Gayanich were not 'chasing' or 'following' James's car but were just proceeding in a lawful manner and that their actions that night, in no way, can be construed as being such as to warrant a finding that they were engaged in illegal, unprotected activities or conduct" (R. 302).

This finding rests on the bare denials of Dausy and Gayanich. It means the rejection of the testimony of the police officers as well as the three victims and Sherwood. It leaves unexplained the receipt by the police over the radio of information regarding a chase and the pursuit of the victims into the swamp.

The Act protects the rights of nonstrikers as well as strikers. Employees have a right to refrain from striking and the right to go to and from work without restraint or coercion while the strike is in progress. The fact that

James and his companions had assisted nonstrikers to go to work did not make them open game for pursuit and intimidation. The Board itself has recognized the unlawfulness of the type of pursuit shown by the evidence here. In *Int'l Longshoremen's and Warehousemen's Union* (1948) 79 NLRB 1487 it held, p. 1505:

"The conduct of the strikers and their companions, quite apart from the words they used, in trailing the greatly outnumbered little group of strikebreakers for a considerable distance through the town was clearly intimidatory. This pursuit away from the plant by an inimical superior force clearly conveyed the unspoken threat that the strikebreakers might well be subjected to bodily harm. As such it was hardly less coercive within the meaning of section 8(b)(1) than an express threat of physical violence."

It was for such conduct that Dausy and Gayanish were discharged. The pursuit, "in this atmosphere of violence, assumed added coercive significance."⁴⁰ It was clearly unlawful and unprotected. It may be that the evidence would not be sufficient to establish the guilt of Dausy and Gayanich beyond a reasonable doubt in a criminal action. But it cannot be denied, in view of this record, that the Company's action was based on evidence which, to a fair mind amply justified discharge.⁴¹

⁴⁰*Cory Corporation* (Local No. 1150, United Elec., Radio & Machine Workers) (1949) 84 NLRB 972, 973.

⁴¹See: *Albrecht v. National Labor Relations Board* (7 Cir. 1950) 181 F.2d 652, 659.

3. OBSTRUCTION OF RAILROAD TRACKS ON OCTOBER 6TH—COMPLAINANTS HERE INVOLVED: BRADLEY, BROCK AND GUNTER.

(a) The evidence on obstruction of railroad tracks.

On October 6, 1948, three pickets blocked the movement of a locomotive at No. 31 Gate by standing and walking on the track so as to prevent it from entering the refinery. Bradley, Brock and Gunter were identified as the pickets, were charged with violation of the state court restraining order (Resp. Exh. 81, 83) and convicted of contempt and fined (R. 147, 160, 168-171, 189-193).

Acting Chief of Police Phipps testified that the pickets continued to walk back and forth across the track in the path of the oncoming locomotive until it stopped; that he told Bradley, leader of the group, he was blocking the railroad entrance and referred to the provisions of the court restraining order; that Bradley said "he would not move, that he would lay down on the track first" (R. 3123). Police Officer Baroni's testimony is in accord with the testimony of Chief Phipps. He identified Brock as one of the pickets and testified that "if the train had proceeded it would have run over these men on the track" (R. 3592-3593). Gunter admitted being the other picket (R. 1527).

Bradley claimed he only walked back and forth parallel with the track. Brock testified that he did not stand on or walk across the track while the locomotive was within fifty yards. Gunter could not remember.

The moving picture taken at the scene and introduced in evidence (Resp. Exh. 43) corroborates the testimony of the police officers. Bradley admitted on the witness

stand that he "didn't care nothing" about police orders (R. 1363) or court restraining orders (R. 1341).

(b) The evidence amply justified discharge.

The trial examiner found that the pickets did not prevent the locomotive from entering the refinery because the Company itself had barricaded the gate "so that no vehicle could enter or leave." On this the Board correctly found the trial examiner was in error (R. 215).

But the Board (one member dissenting) goes on to hold (R. 215-216):

"Bradley's conduct in picketing across the railroad tracks is no different from the picketing engaged in by striker Charles Borreani⁴² across the entrance way to the Respondent's parking lot which we hereinafter find to be protected activity. The record does not establish that Bradley was blocking ingress by merely walking back and forth across the track when an approaching locomotive was some distance away. Nor do we regard Bradley's mere statement, uttered in the heat of controversy, that he would lie down on the tracks rather than permit passage of trains, as sufficient under the circumstances to constitute an attempt to block entry to the refinery."

It may be that neither Bradley, Brock nor Gunter could physically block the passage of an approaching locomotive "by merely walking back and forth across the track" if the locomotive engineer were determined to enter the plant regardless of their safety. The fact is, however, that

⁴²Borreani "walked back and forth across the entrance way to Respondent's parking lot; he was bumped by cars seeking to enter; police pulled him out of the way twice" (R. 218).

they did block the passage of the train and as held in *National Labor Rel. Bd. v. Perfect Circle Co.* (7 Cir. 1947) 162 F.2d 566, this justified their discharge.

Bradley's statement to the police that he would lie down on the tracks rather than permit passage of the train may not be sufficient in itself, as the Board states, "to constitute an attempt to block entry to the refinery" (R. 216). It does, however, establish beyond question his state of mind and purpose in continuing with the other pickets to walk on the track in front of the approaching locomotive. The blocking of the track was not unwitting nor was it incidental to lawful picketing. It was intentional and in addition to being a deliberate violation of a duly issued restraining order, it did not constitute an activity protected under the Act.

We submit that a preponderance of the evidence in this case establishes that this conduct, condemned by the state court, was the sole reason for the discharge of the three complainants here involved and justified discharge.

**4. ASSAULT AT GATE NO. 16 ON OCTOBER 8TH—COMPLAINANTS
HERE INVOLVED: LODS AND MacDONALD.**

(a) The evidence on the assault at Gate No. 16.

On the evening of October 8th a meeting was held in Richmond of one of the AFL unions whose members were not on strike. A group of nonstrikers attended and shortly after 11 P.M. returned to the refinery in three cars. An occupant of each of the three cars testified that the cars proceeded very slowly through the refinery gate; that as the second car went through the picket line the left rear door window was smashed (R. 4108); that as the

third car went through the line the pickets hurled rocks and missiles, breaking the car windows and knocking holes in the side of the car (R. 4055-4056); that the third car stalled a short distance inside the gate and the occupants of all three cars got out to push the stalled car which was being stoned by the pickets (R. 4057, 4086, 4110). Reinforcements joined the pickets (R. 4067; Resp. Exh. 27) and a general rock fight followed. Photographs of one of the cars showing extensive damage was introduced (Resp. Exh. 25, 26).

Nonstriker Sherwood testified that as the car in which he was riding went through the picket line he saw a picket with a rock in his hand, that he saw the picket bring his arm up as if to throw, that he, Sherwood, had a slingshot, and that (R. 4085):

“I told this guy, I said ‘You let go and I let go.’ He didn’t let his rock go so I held onto mine.”

Orman Kelley, a guard temporarily hired by the Company during the strike and stationed at the gate at the time, testified as a General Counsel’s witness. He testified that he saw one of the occupants of the car aim a slingshot out the window of the car as it went in the gate, but did not see him shoot it, nor did he see anyone hit at that time (R. 4469). He testified that as the cars went in the gate he heard the sound of broken glass; that he did not see what caused it; that the last car was barely through the gate when he heard this crash of glass; and that the crash is what started the ensuing fight (R. 4472, 4488).

In the fight which followed between the returning workers and the pickets, two of the complainants, Lewis Mac-

Donald and Bert F. Lods, were injured by flying missiles. They and another picket, complainant Wyatt, testified that they saw nothing thrown and heard nothing as the cars crossed the picket line (R. 2257, 2258, 2284-2286, 1063). MacDonald admitted he was standing on the right as the cars went through the gate (R. 2284). Lods claimed he was on the coffee detail and had gone to the gate to pick up coffee cups, although he also indicated he was doing picket duty (R. 2275).

After the fight the pickets told the workers, "One of your own buddies called up and told us you were coming and we were waiting for you" (R. 4089).

Shortly after the attack, there came to the attention of the Company's general manager Rowell a sheet headed "Picket Line News" of the kind circulated among the pickets from time to time during the strike, which stated, regarding the incident, "Thanks to a tip-off from a boiler-maker, our reserves were moved to the scene" (R. 4365; Resp. Exh. 27).

The Company made an investigation of the melee and concluded that the nonstrikers had been the victims of a planned attack and had acted in self-defense (R. 4404-4405), and discharged Lods and MacDonald.

(b) The evidence amply justified discharge.

The trial examiner found that in his opinion "the melee at Gate No. 16 on October 8th, was started by the occupants of the three cars led by Sherwood" (R. 359). The finding is that Sherwood, who was in the first car, instead of threatening the pickets with retaliation if they used the rocks they were holding, as he testified, actually

used the slingshot and hit one of the pickets and that started the melee (R. 359). There is no evidence whatever to support this surmise.

There is not a single line of testimony or evidence of any kind that any picket was hit or assaulted or that anything was thrown at or shot at any picket by anyone until *after* the workers' cars had passed through the gate, at which time they were severely battered and smashed by the strikers.

That the pickets initiated the fight by smashing two of the three cars as they went through the gate is clearly established by the testimony of the General Counsel's own witness Kelley, that the crashing of glass as the cars went through the picket line "started it" (R. 4488).

Lods, though not one of the regular pickets, admitted he was directly in the gateway when the fight started and that he may have fallen inside the gate (R. 2261).

The evidence shows that MacDonald was standing on the right as the car went through the gate (R. 2284), that a picket standing there held a rock (R. 4085) and that two cars were damaged on the right side while passing through the gate (R. 4056, 4113). MacDonald's denial that anyone outside threw rocks, and that there was no crash of glass as the cars entered the gate is reason enough to attach no credibility to his bare denial that he took no part in the attack.

In determining whether the Company's general manager was reasonable in concluding that the melee was the result of planned attack by the strikers, we ask the Court to consider, in addition to the testimony of the eye wit-

nesses, the admission in the bulletin of the striking union that "Thanks to a tip-off from a boilermaker, our reserves were moved to the scene" (Resp. Exh. 27) and the testimony that after the fight the pickets told the non-strikers "Pretty good! One of your own buddies called up and told us you were coming and we were waiting for you" (R. 4089). We submit that the preponderance of the evidence clearly sustains the judgment of the Company.

5. YACHT HARBOR ASSAULT ON OCTOBER 12TH—COMPLAINANTS HERE INVOLVED: ALCARAZ, COLEMAN, OGDEN, MARTINEZ, MOCZKOWSKI AND B. VETTER.

(a) The evidence on the Yacht Harbor assault.

Before dawn on the morning of October 12th five employees attempted to return to work. They drove toward the end of a peninsula west of the refinery and followed a dead-end road to a railroad track, at a point known as Clark's Yacht Harbor. They had intended to drive along the railroad ties into the rear area of the refinery. Before they could reach the refinery they were assaulted and chased by a group of men who lay in wait in the dark along the railroad track.

As a result of circumstances which will be reviewed the Company decided that nine of the complainants apprehended in the vicinity were responsible for the attack and discharged them.

The road to the Yacht Harbor passes through a gate⁴³ a little more than a mile from the Yacht Harbor. During the strike the Company maintained watchmen at this gate

⁴³Referred to in the record as the "Naval Depot Gate."

who recorded the make and license number of all cars passing through the gate and also noted in a book the number of passengers in each car (Resp. Exh. 67). The road passing through this gate is the only highway to the Yacht Harbor. This record shows that between 12:00 M. on October 11, 1948, and 5:19 A.M. on October 12th, all cars passing through the gate toward the Yacht Harbor had returned through the same gate (Resp. Exh. 67).

At 5:19 A.M. a car owned and driven by the complainant Coleman passed through the gate and proceeded toward the Yacht Harbor (Resp. Exh. 67, 72). With Coleman were complainants Ogden, B. Vetter and Hiawatha Autry, as to whom the Board refused to issue a complaint.

At 5:20 A.M. a car owned and driven by the complainant Moczowski passed through the gate and proceeded toward the Yacht Harbor (Resp. Exh. 67, 73). With Moczowski were complainants Alcaraz, Martinez and Patrick A. MacDonald, as to whom the complaint was dismissed, and one George Vetter.

Each car, according to its occupants, when it reached the Yacht Harbor was parked under or near a certain floodlight in that area, remained parked for 15 or 20 minutes and then was driven back to the above-mentioned gate where they were both stopped at 5:50 A.M. (Resp. Exh. 67).

Allowing for driving time, the two cars were parked at the Yacht Harbor from approximately 5:26 A.M. to 5:45 A.M. The occupants of each car admitted that some, if

not all, of them got out. Yet, unbelievable as it may seem, the occupants of neither car would admit at any time seeing the other car or its occupants.

At 5:29 A.M., while the two cars of the complainants were still at the Yacht Harbor, the car occupied by the victims of the subsequent attack passed through the gate in question and proceeded to the Yacht Harbor (Resp. Exh. 67, 74). In this car were nonstrikers Tieger, the driver, and Paasch, Vaughn, Antaki and Dailey (R. 3923-3924). They took this roundabout route to work because, as Dailey testified, they were afraid of being molested if they attempted to go through the picket lines (R. 3924-3925).

Tieger drove through the parking area at the Yacht Harbor and started down the railroad track. At this point they saw two unoccupied cars (R. 3927, 4003-4004). About 200 feet from the parking area they found the way blockaded by ties and steel girders. The car was stopped and as the five nonstrikers were removing the obstruction they were attacked by a group of men, shouting vile names and throwing rocks. They were beaten with sticks and Vaughn was kicked in the mouth (R. 4006-4008, 4025).

After the attack, two of the nonstrikers, Vaughn and Antaki, who had been knocked down, got up and climbed over a hill and eventually found their way into the refinery. Vaughn testified that as he and Antaki were climbing the hill, about 15 minutes after the attack, they saw two cars leave the vicinity of the attack (R. 4010).

Nonstrikers Dailey and Tieger escaped in the latter's car by backing along the railroad track, and then driving over a hill toward the Naval Depot Gate (R. 3933-3934).

Before reaching the gate, just before 5:50 A.M., they reported the incident to a Company guard at what is known as the TCC Salt Water Station (R. 3934-3935).

The other nonstriker, Paasch, while hiding under a barge saw two cars leave the Yacht Harbor area about 10 minutes after the attack or about 5:45 A.M. (R. 4026). Approximately 5 minutes later, while Tieger and Dailey were reporting to the guard at the Salt Water Station, two cars were seen coming from the Yacht Harbor and Tieger and Dailey told the guards, "Looks like a couple of cars that were out there" (R. 3935-3936). The guards stopped the two cars at 5:50 A.M. (R. 3936, Resp. Exh. 67). These were complainant Coleman's car and complainant Moczkowski's car.

Shortly thereafter, nonstrikers Dailey and Tieger returned to the Yacht Harbor with the police, the two cars previously seen in the parking area were gone, and the scene of the attack was deserted (R. 3947-3948, 3957-3958).

As to what transpired during the early morning hours of October 12th, the testimony of the complainants varied greatly.⁴⁴ In one respect, however, their testimony was

⁴⁴Martinez testified they left the Union Hall about an hour and a half after 11:00 P.M. (R. 1114-1115); Alcaraz, that they left about 1:00 or 1:30 A.M. (R. 1778); MacDonald, that they left about 3:30 or 3:45 A.M. (R. 2323); and Moczkowski, that they left five or six hours after 11:00 or 11:30 P.M. (R. 2112). B. Vetter testified that they left the Union Hall about 3:30 or 4:00 A.M. (R. 1883); Coleman, that they left between 4:00 and 4:30 A.M. (R. 1978); and Ogden that they left about 5:00 A.M. or 5:30 A.M. (R. 2655). Alcaraz testified they parked under "a big floodlight" (R. 1783); Moczkowski testified, "It wasn't a very big light" (R. 2136). Vetter, Ogden and Coleman were all in the same car; however, Coleman testified all of the occupants got out of the car at the Yacht Harbor (R. 1987); Ogden, that only two of the four occupants got out of the car (R. 2657); and Vetter testified no one got out of the car at the parking lot and that the car did not even stop there (R. 1887, 1893).

markedly similar. Although the two cars of the complainants and nonstriker Tieger's car within minutes of each other passed along the only road into the Yacht Harbor, going and coming, and parked in or passed through the parking area which was at least partly illuminated, each of the involved complainants⁴⁵ denied that the car in which he rode passed any other car, that any other car arrived at or left or passed through the parking area while he was there, or that he saw, other than the occupants of the car in which he was riding, any other persons at or about the Yacht Harbor area. The physical facts and the undisputed evidence make these denials unbelievable. The conflicting testimony and the unbelievable denials of these complainants destroy the credibility of their story that they drove to the Yacht Harbor in the early morning hours merely for the ride and that they saw nothing and they did nothing while there.

As the attack was sudden and before daylight, with only partial illumination from automobile headlights at the scene, recognition or positive identification of the assailants by the victims was not possible. Vaughn, Dailey and Paasch each so testified (R. 4009, 3944, 3952, 4025). The beaten men did, however, obtain some impression of the appearance and dress of their attackers (R. 4007, 4025, 3931-3932). There were similarities in the appearance and dress of the group stopped at the gate (R. 3937-3939, 2128-2129, 1114). When asked by the police at the Naval Depot gate if they could identify their assailants,

⁴⁵Alcaraz (R. 1785-1786, 1788), Coleman (R. 1983-1984, 1987), Martinez (R. 1112-1113, 1118), MacDonald (R. 2324, 2328-2330), Moczowski (R. 2117-2118, 2120-2121), Ogden (R. 2658), and Vetter (R. 1886, 1890).

Vaughn, Tieger, Dailey and Antaki all truthfully said they could not (R. 4016, 3939, 3953).

(b) The evidence amply justified discharge.

That an unlawful attack was made on five workers attempting to return to their jobs in the early morning hours of October 12th is not disputed.

The identification of the attackers by the victims of the attack, however, was admittedly fragmentary. The case as far as these complainants are concerned is almost wholly circumstantial. But, as this court has said, "Circumstantial evidence may be as cogent and convincing as direct evidence."⁴⁶

The time record maintained by the guards at the gate together with the complainants' testimony as to the route they drove after entering the gate without question places the complainants in the vicinity of the attack when it occurred. Yet the trial examiner concluded "that none of the occupants of Moczkowski's and Coleman's cars were in the vicinity of the place of the attack at the time it was being committed" (R. 257). We submit that such a finding is clearly contrary to the preponderance of the evidence.

The Naval Depot gate records were identified, explained and introduced in evidence (Resp. Exh. 67, 72, 73, 74; R. 3905-3918, 4441-4444), and show to the exact minute when the complainants went through the gate to the Yacht Harbor and when they returned. Yet there is no finding of even the approximate time the complainants were at the Yacht Harbor. As to the complainants, the only reference

⁴⁶*Rocona v. Guy Atkinson Co.* (9 Cir. 1949) 173 F.2d 661, 665.

to time is the finding that Alcaraz and the others decided to go for a ride "at about 4 o'clock" (R. 245). As to the time of the attack, the findings merely state that it occurred "on the morning of October 12" (R. 249).

It was not upon these partial facts that the Company concluded that the occupants of the two cars which were stopped at the Naval Depot gate at 5:50 A.M. must have been involved in the attack. The Company knew the complainants were in the vicinity between 5:20 A.M. and 5:50 A.M., and that the attack occurred sometime between 5:29 A.M. and 5:50 A.M. Allowing for driving time, it will be seen that the complainants must have been in the Yacht Harbor area when the attack occurred. To these facts add the testimony of nonstrikers Vaughn and Antaki that as they climbed a hill to escape and of Paaseh that as he hid under a barge they saw two cars leave the Yacht Harbor on the road back to the gate where a few minutes later the two cars were sighted by Dailey and Tieger and stopped by the guard, as shown by the time book, at 5:50 A.M. Add to this the fact that shortly thereafter the police with Dailey and Tieger returned to the Yacht Harbor and found the area deserted. These facts, coupled with the victims' description of the attackers, fragmentary as it was, furnished a closely connected train of circumstances which lead with more than reasonable certainty to the conclusion that these complainants were the attackers. There is nothing in the record to show that the Company's judgment in reaching that conclusion was affected by anything other than these proven circumstances.

The trial examiner found "that Paasch, and Vaughn [two of the five victims of the attack] not only admitted to the police officers at the Naval Depot gate, a few hours after the attack, that none of the occupants of Moczkowski's and Coleman's cars were among the persons who had committed the attacks, but they also renewed these admissions at the hearing herein" (R. 254). Nowhere in the testimony of either Paasch or Vaughn is to be found any such admission. The Board properly rejects this finding as erroneous as to Paasch (R. 209, note 1). Paasch was not at the Naval Gate at the time. Vaughn testified that he told the police, and he honestly admitted at the hearing, that he could not identify the complainants as his attackers. On the other hand, he made no such statement, as is attributed to him by the trial examiner, that none of the complainants were among the persons who committed the attack.

The findings distort in the same way the testimony of the nonstriker Dailey. Dailey testified that he did not know whether the apprehended men were the attackers (R. 3939, 3941) and he did not, as the Board found, state that the suspects were not among the attackers.

Dailey testified that though he could not with certainty identify the men apprehended at the gate as his attackers he did notice similarities of dress and appearance. He mentioned this to the police who said "That is not enough for an arrest by something like clothing" (R. 3951). He also set forth the facts in this regard in a written statement furnished the Board field examiner on December 21, 1948. This statement is quoted in the findings (R. 255-257) apparently as evidence of impeachment. Neither the General Counsel who introduced the

statement in evidence nor the trial examiner who relies on it to discredit the witness points to any material inconsistency between the statement given in December, 1948, and the witness's testimony eight months later.

6. ROCK THROWING AT GATE NO. 1 ON OCTOBER 18TH—COMPLAINANTS HERE INVOLVED: DONALDSON AND OTTINO.

(a) The evidence on rock throwing at Gate No. 1.

On the morning of October 18, 1948, although warned by police over a loudspeaker of the terms of the Superior Court restraining order (R. 3477-3478, 3512), a large crowd of men gathered outside No. 1 Gate of the Company's refinery. About 7:00 A.M. a car drove through the gate into the refinery, and the pickets battered it with heavy rocks (R. 3478, 3513, 4311; Resp. Exh. 19). This precipitated a rock fight between the men inside and those outside the gate. Identified in the crowd outside the gate were the complainants Donaldson and Ottino, each of whom first denied and then reluctantly admitted participating in the rock throwing.

Neither Donaldson nor Ottino was a straightforward or honest witness. Donaldson's testimony, that he was "pretty sure" he didn't throw anything that morning was false by his own subsequent admission that he "did heave one rock * * * fairly good sized, like a baseball, maybe" (R. 1665-1666). Likewise Ottino's testimony that he "was just standing around" and was not throwing rocks proved not to be truthful. Ottino's reluctant admission that he "tried" to throw over the fence "twice, I believe," confirms the testimony of witness Canali regarding Ottino that "He picked up the rocks and he threw his arm like throwing a baseball, and then stooped and done the same thing again" (R. 4316-4317).

b) The evidence amply justified discharge.

In spite of Donaldson's admission at the hearing that he threw a rock the size of a baseball in the direction of a refinery building around which a group of non-strikers were gathered (R. 1665) the trial examiner found that "the credible evidence shows that Donaldson took no part in the rock throwing" (R. 308). The Board properly rejected the finding as erroneous (R. 209, note 1), but, without further discussion, orders the Company to reinstate Donaldson.

As to the other complainant, the trial examiner found (R. 385): "Admittedly, Ottino threw two stones in the direction of the people at the boiler house," but recommends reinstatement because "the Respondent did not discipline non-strikers for throwing rocks." The Board rejects the trial examiner's rationale (R. 216-217), but (one member dissenting) orders Ottino's reinstatement on the ground that his conduct "was not of such a serious nature as to pass the limits of protected activity" (R. 217).

In the process of enacting the Labor Management Relations Act of 1947, Congress specifically condemned attempts by the Board "to distinguish between what it considered as major crimes and minor crimes for the purpose of determining what employees were entitled to reinstatement."⁴⁷ Long before this the Supreme Court, referring to the Wagner Act, said "There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land."⁴⁸

⁴⁷House Report No. 510, U.S. Code Cong. Serv., 80th Cong., 1st Sess., 1947, pp. 1144-1145.

⁴⁸*Labor Board v. Fansteel Corp.* (1939) 306 U.S. 240, 257-258.

Nevertheless, the Board throughout this case, and particularly in its treatment of the convicted mass picketers and these admitted rock throwers, has attempted an arbitrary and unauthorized segregation of "serious" from the "not so serious" lawbreakers in determining which employees had been lawfully and which unlawfully discharged. We submit that an employer's right to discharge does not depend upon such nebulous distinctions.

7. AMBUSH ON WINEHAVEN ROAD ON OCTOBER 25TH—COMPLAINANTS HERE INVOLVED: BRAKKE, BUSHONG, COLLINGSWORTH, DAUSY, DODSON, ANTONE GAYANICH, LANGENSAND, OGDEN, PITTMAN AND SNEAD.

(a) The evidence on the ambush on Winehaven Road.

Because of an extended nightly campaign of property damage and harassment of workers which reached a peak on or just prior to October 24th, the acting Chief of Police of the City of Richmond issued special orders to his officers to put an end to this vandalism (R. 3131-3133). Investigation by police pursuant to these orders resulted in the arrest of twenty-one of the complainants during the night hours of October 24th and 25th (R. 3134, 4367).

The first arrests were made during the early morning hours of October 24th. Police officers investigating vandalism suspects found the complainant Brakke and others (R. 3523-3525) in a car with 3 "saps" or blackjacks made of cable and tape, pieces of brick, large rocks, a slingshot and other articles (Resp. Exh. 48; R. 3328, 3388-3389).

Less than 24 hours later Brakke was again apprehended by the police in another car containing an assortment of

aps and other crude weapons (Resp. Exh. 51). This incident involved an ambush after midnight on October 25th in which first a taxicab and then a police car were halted on a lonely road by a group of 14 men who lay in wait for workers using this route to get in and out of the refinery (R. 3341-3342, 3399). Workers who were afraid to use the main gates of the refinery used this road to reach an area back of the refinery where they climbed over the fence or drove down a railroad track into the refinery (R. 3344, 3924-3925, 4022-4023).

Shortly after 1:00 A.M., a taxicab driven by Roy W. Haglund on Winehaven Road toward Point Molate, while proceeding through a cut in the hill at this point in the road, was struck by a flying object and ordered to stop. According to Haglund he stopped the cab immediately and "a couple of fellows came up to the cab, seen I had sailors, said, 'It's O.K. to go on through'" (R. 3824). This testimony of the cab driver is corroborated in part by admissions at the hearing by the complainant Dausy,⁴⁹ one of the fourteen men later arrested (R. 1745-1746). At the time the cab driver noticed three cars parked along the road, two men by one car and six or eight by the other cars (R. 3825). The complainants admitted having parked in three cars along the road at this point and that some of them were out and around the cars and up and down the road (R. 1255, 1449, 1743, 2189-2190, 2710). On his return trip, when Haglund reached the place where his cab had been hit, someone "flashed" him down, "apologized for throwing the stuff at" the cab and said

⁴⁹Dausy was also involved in the pursuit out Castro Street on October 4th reviewed herein at pages 62-66.

"the boys were a little hasty" (R. 3826). The same group of men were gathered along the road (R. 3826). The complainant Wyrick, one of the fourteen men later arrested, admitted that he and Hershberger were in this group (R. 2193).

The cab driver reported the incident to police officers parked in a police car near Gate No. 16 (R. 3827-3828). They called the police inspector (R. 3828). Inspector Davis and Lieutenant Fray responded to the call, picked up the cab driver at Gate No. 16 and proceeded to the place where Haglund's cab had been hit (R. 3330-3331, 3395-3396, 3828).

As the police car came to this point in the road, a man crouched beside the road with a flashlight and signalled it to stop (R. 3333, 3397, 3829). As Lieutenant Fray got out of the car, another man came up with rocks in his hands "in a threatening manner" and ten or twelve men appeared out of the darkness (R. 3334, 3397, 3452). The police officer in the car called on the police radio for assistance (R. 3334, 3398) and when more officers arrived the men were ordered to line up by the three cars, a Mercury, a Pontiac and a Chevrolet, parked on the side of the road, and the cars were searched (R. 3341-3343, 3400). The men told the police they had heard that Standard Oil workers were using that road to get into the plant, and they were out there to stop men from going through to work (R. 3342, 3399). In the cars were found clubs, sticks, pieces of rope, a piece of cable, a slingshot and other articles (Resp. Exh. 46, 49, 50, 51). Fourteen men were arrested, including complainants Antone Gayanich, Collinsworth, Dausy, Snead, Dodson, Bushong,

Langensand, Pittman, Brakke and Odgen. In addition, the police arrested one Alva Clark, not an employee of respondent, Hiawatha Autry, as to whom the Board refused to issue a complaint, and Wyrick and Hershberger, as to whom the complaint was dismissed (Resp. Exh. 46).

Ten of the men arrested were examined at the hearing. All testified they were just out for a ride or killing time. None of the complainants would admit hitting or seeing the cab hit. However, the police found in one of the three cars occupied by the complainants a short piece of cable which fit precisely the dent made in the cab by the missile which struck it that night (Resp. Exh. 53; R. 3413-3415). Bushong, Langensand, Ogden and Snead claimed either that they did not see the cab or that they did not see it stop at any time (R. 2709, 2795, 2652, 1312). Wyrick saw it stop only on the return trip (R. 2191). A. Gayanich saw it stop 100 feet and Collinsworth from 100 to 150 feet from the car in which they had come to the scene (R. 2031, 1257, 1259). Pittman claimed it stopped "down the road a ways where the other cars were" (R. 2543), as did Brakke (R. 1446). Dausy admitted the cab stopped opposite the point along the road where he and others in the group were gathered (R. 1744).

The cab driver testified that when he returned to the scene of the incident with the police officers he could not identify any particular individual, but that "It did look like the same group," and he saw one man with a red plaid jacket and another with a suntan jacket that he had seen before (R. 3830). He testified he told the police they were the same groups and he "knew for sure on account of the way they were dressed the first time" (R. 3836).

He truthfully testified that he did not see and consequently could not identify which one of the group had hit his cab (R. 3837). Police Lieutenant Fray corroborates the cab driver. He testified that while Haglund could not identify the person who hit his cab (R. 3364) he recognized the group and where the incident happened (R. 3371). In view of the admissions of the complainants Dausy (R. 1745-1746) and Wyrick (R. 2193-2194) there can be no doubt that the group which waylaid the cab between 1:00 and 2:00 A.M. was the same group which a few minutes later stopped the police car.

Lieutenant Fray who, the Board found, testified in a straight forward and impressive manner (R. 277) further testified that when he asked the group at the scene what they were doing out there, "I don't know how many answered the questions, but they said, 'We are out here because we have information that the workers from the Standard Oil are using this road to get into the plant'" (R. 3341-3342) and that they were there to stop workers from "sneaking out that way and over the fence" into the plant (R. 3338). Inspector Davis testified that the group said "they didn't want anybody going through there that might be going into the Standard Oil Company" (R. 3399).

(b) The evidence amply justified discharge.

The Board concluded that the Company unlawfully discharged Brakke and the other complainants because "neither Brakke nor the 13 other men arrested with him on the morning of October 25 were involved in the Haglund incident" (R. 278) although the Board also found "Each of them admitted, however, being in the vicinity

of the place where Haglund testified his cab had been hit" (R. 277). This conclusion is based upon the following:

"Haglund testified that he recognized two of the men who approached his cab immediately after it had been hit. He further testified that these two men were among those arrested. Police Lieutenant Fray, the officer in charge of the approximately 14 police officers who made the aforesaid arrests, testified * * * that Haglund stated that he could not identify anyone of the 14 men. The undersigned was very favorably impressed with the straightforward manner in which Fray testified and finds that Haglund did not testify truthfully when he stated that two of the men who approached his cab after it had been hit were among the 14 men arrested."

The Board has misread the record. Lieutenant Fray did *not* testify "that Haglund stated that he could not identify anyone of the 14 men." Fray testified, as Haglund himself testified, that he could not say which one of the 14 persons had hit the cab (R. 3363-3364, 3370). Fray's testimony does not in any way contradict or discredit the cab driver Haglund.

Haglund's testimony that the group arrested was the same group that was at the scene a few minutes earlier when his cab was hit is beyond dispute in view of the admissions of the complainant Dausy (R. 1745-1746). The trial examiner's contrary conclusion is insupportable.

We have seen in connection with the assault at Clark's Yacht Harbor⁵⁰ how the findings twist the testimony of

⁵⁰Supra p. 81.

Vaughn and of Dailey, victims of the attack, that they could not identify the attackers into a statement that the apprehended complainants were not the attackers. In a similar manner in this case, the testimony of Lieutenant Fray that Haglund could not say which individual hit his cab is twisted into a statement that Haglund could not identify anyone in the group apprehended as in the group when his cab was hit. The grounds upon which the trial examiner attempted to discredit the cab driver are without foundation of any kind in the record. His testimony is fully corroborated by the testimony of the police officers which the trial examiner credits. Further, we submit that the testimony of the police officers alone establishes the unlawful nature and purpose of the complainants' rendezvous on this road that night.

The manner in which the group stopped first the cab and then the police car, the failure of the complainants to give any plausible reason for congregating in such numbers at this remote point after midnight, the finding of an assortment of clubs and other weapons in the complainants' cars, coupled with the admission by the complainants testified to by Lieutenant Fray and Inspector Davis that they were out there to stop workers from sneaking over the fence and into the plant, establish by a preponderance of the evidence that these complainants were engaged in an unlawful attempt to prevent by force, threats and intimidation workers from going to work in the refinery.

There is no evidence of any kind that these complainants were engaged in nor did any of them claim they

were engaged in any activity protected by the Act during the early morning hours of October 25th, nor is there evidence of any kind in the record that any of them were refused reinstatement by the Company for any legally protected activity.

8. FURTHER ARRESTS ON OCTOBER 25TH—COMPLAINANTS HERE INVOLVED: HARDIN AND KELLEY.

(a) The evidence on further arrests.

A few hours after the taxicab had been waylaid on the Winehaven Road, at approximately 4:30 A.M. on October 25th, the city police observed a coupe follow a cab south on Castro Street and turn west on Standard Avenue going toward Point Molate (R. 3678). After the two cars turned into Standard Avenue, the coupe started to draw up beside the cab, and the police car followed. Several blocks west on Standard Avenue, the coupe crowded the taxicab to the curb where both stopped. As one of the men in the coupe got out and went over to the cab, the police came up (R. 3679). The cab driver told the police the men in the coupe had "demanded that he pull over, turn his dome light on, that they wanted to see what he had in the cab" (R. 3680). The men in the coupe were the complainants Hardin and Kelley (R. 3681). When asked by the police why they stopped the cab, Hardin said he "wanted to see who was in it" (R. 3707). In Hardin's pocket was found a large ball bearing tied in the corner of a handkerchief (R. 3682). Four large rocks, a short piece of lead cable, an ice pick and other objects were found in the car (Resp. Exh. 61; R. 3688-3689). Hardin and Kelley were arrested and charged with violation of the Deadly Weapons Act (Resp. Exh. 60).

Hardin and Kelley disagree on where they had been and where they were going at the time. Hardin testified that he and Kelley had been to No. 31 Gate on Castro Street, and had driven south on Castro Street and west on Standard Avenue (R. 2072). This admission corroborates Police Sergeant Warner who testified he saw the coupe follow the cab south on Castro Street and turn west onto Standard Avenue (R. 3677-3678). Contradicting Hardin, Kelley testified he was positive they did not drive up Castro Street (R. 860). Both Hardin and Kelley claimed they knew nothing of the rocks or the piece of cable found in the car (R. 869, 2077-2079). Hardin denied the ball bearing tied in his handkerchief was a sap or "persuader" and claimed it was a "souvenir" (R. 2078).

(b) The evidence amply justified discharge.

Again we find the trial examiner distorting the testimony of a witness and attempting to discredit him upon facts without support in the record. He found that Police Sergeant Warner "testified at great length * * * about overhearing the conversation between Hardin, Kelley, and the cab driver and about hearing Hardin and Kelley make certain admissions to the other police officers * * *" (R. 333-334). There is not a word of such testimony by Warner in the record. The trial examiner further found that when Warner was asked why the police seized a flashlight,⁵¹ "Warner said, in effect, because the flashlight could have been used as a blackjack" (R. 334). We are unable to find any such testimony in the record. Nevertheless, on the basis of the foregoing, the trial examiner concluded that Warner "was far from a credible witness."

⁵¹See Resp. Exh. 61.

The Board recognizes, in part, the trial examiner's error and notes that Officer Warner did *not* testify "that he overheard a conversation between Hardin, Kelley, and a cab driver on October 25, 1948, as set forth in the Intermediate Report" (R. 209, note 1). In spite of the fact that there is no justification whatever in the record to discredit the police officer, the Board like the trial examiner, accepts the glib story of Hardin and Kelley that they did not stop the taxicab, the cab driver stopped them and that they knew nothing about the rocks and other articles found in the car.

Whether or not the coupe crowded the cab to the curb, as it appeared to the police officers, it is obvious from the admissions of Hardin and Kelley that the cab driver was aware of being pursued and was concerned for his safety. Another cab driver testified that one night during this period about 2 A.M. in the same vicinity, a group of men "stopped me and told me to turn my dome light on or I might get the cab turned over" (R. 3831). The record shows that on another occasion a taxicab was followed from the refinery for about a mile and then turned over on its side by a group of unidentified men (R. 2732-2735).

In view of this series of attacks on taxicabs, and the waylaying of the cab by a group of the complainants on Winehaven Road but a few hours before, it is impossible to attach to the conduct of Hardin and Kelley the innocent motives they professed. The unexplained following of the cab, the warning given the cab driver, and the finding by police of rocks and a short piece of lead pipe in the complainants' car all fit the pattern of planned vandalism and intimidation.

9. **ATTEMPTED ACTS OF SABOTAGE—COMPLAINANTS HERE INVOLVED: LEIGHTY, BRIGHT, HALL, MORGAN AND VANEK.**

(a) The evidence on attempted acts of sabotage.

During the strike there were several attempts to sabotage operation of the Company's refinery. During the evening of September 21st, approximately a mile and a half north of the plant, in an isolated district, padlocks on certain gas valves were broken and the valves closed, shutting off the supply of natural gas to the refinery (R. 4353-4355, 2939-2941). On the same evening at the same hour, at a point 3 or 4 miles away, a switch was pulled on the main power plant (R. 4356, 2941). Natural gas is one of the principal fuels used in the refinery. Cessation of gas or a change in the supply of gas to the cracking units operating at very high temperatures and high pressures could be extremely hazardous to equipment and to personnel (R. 4354-4355). Serious damage was avoided because the workers in the refinery were alerted to the danger by constant rumors of threatened sabotage and were prepared to meet the emergency when it occurred by switching from gas to fuel oil (R. 4355). Subsequently, the bottom valves on five 60,000-barrel gasoline storage tanks were found open at the Company's San Pablo tank farm, five miles north of the refinery (R. 4357).

Charles Camren, who had been on strike and returned to work before the end of the strike, testified that in the early part of November, about 4 or 4:30 in the morning, he was called to the telephone, and the party calling said, to quote Camren, "If you don't get out of there I am going to tell what I know about the gas valve" (R. 4041). Camren identified the caller as the complainant Leighty.

He had worked with Leighty, talked to him on occasions on the telephone before, and Leighty was one of the few people outside the refinery who knew he was working at the time of the call (R. 4044-4045). Leighty admitted talking to Camren on the telephone, claiming Camren had called him, but denied making the statement about the gas valves (R. 4460-4462). He admitted working with Camren, having telephone conversations on occasions with Camren, and knowing that Camren had returned to work before the end of the strike (R. 2778, 4460-4461). Leighty also admitted that, having been "broken in for shift foreman" in the Utility Department, he was familiar with the location of the valves in question and the control of the valves over the illuminating gas supply to the refinery (R. 2776). There is nothing in the record to suggest any reason to doubt the truth of Camren's testimony.

Near the end of September an incendiary missile referred to as a "smoke bomb" which had been ignited and burned out was found inside the refinery fence approximately 30 feet from certain high pressure butane tanks (R. 2948, 3072-3074). It was about the size of a gallon can (R. 2951). Tests conducted by the police showed that the so-called "bomb" made a slow fire of high temperature (R. 3076, 3481-3483). About the same time a mysterious fire which appeared to be of incendiary origin occurred during the night in a lumberyard in the refinery near the fence on Castro Street (R. 2952-2953).

During the evening of October 24th the police saw two workers leave the refinery through No. 1 Gate. Several men in a car slowly followed the workers as they walked up the street (R. 3693, 3714). When the two men boarded

a bus, the car followed the bus for another three or three and a half blocks (R. 2371, 3694, 3717). The police officers stopped the car and upon searching it found, among other things, two large rocks and a smoke bomb (R. 3696, 3719-3720); Resp. Exh. 62). The smoke bomb looked like a gallon can (R. 3696). In the car were the complainants Bright, Hall, Morgan and Vanek and a man named Page (Resp. Exh. 42). When asked what they were doing with the smoke bomb, no one knew anything about it or how it got in the car (R. 3723). The men were arrested and charged with violation of the Deadly Weapons Act (Resp. Exh. 42). Morgan testified they followed the workers from the refinery because "Those guys got a lot of guts" (R. 1685); Hall said regarding the workers "They got plenty of nerve" (R. 1699) and Bright testified they intended "to save [the workers] a lot of trouble" (R. 1522).

(b) The evidence amply justified discharge.

As to the gas valve incident, the Board, solely on the basis of how the two witnesses "impressed" the trial examiner, discredits Camren's testimony and credits the complainant Leighty's denial that he threatened in the telephone conversation with Camren "to tell what I know about the gas valve" (R. 349).

The Board finds that the smoke bomb "cannot per se be chargeable to Bright, Morgan, Hall or Vanek" and their motives were not improper (R. 286). That the plans of the complainants apprehended in the car with the smoke bomb after following the two nonstrikers went beyond peaceful persuasion is indicated by the reference to

saving the two workmen "a lot of trouble" and the admitted remarks "Those guys got a lot of guts" and "They got plenty of nerve." Furthermore, it is unbelievable that the smoke bomb, an object the size of a gallon can, found in the back seat of the car where some of the complainants were sitting should go completely unnoticed by everyone.

While the evidence does not show, and admittedly the Company was never able to determine, the complainants' responsibility for the acts of sabotage, the record shows the refusal of re-employment in these cases to be the lawful exercise by the employer of its normal right to select its employees under trying circumstances.

The entire community was terrorized by widespread vandalism and continued threat of violence. The circumstances justified strong measures. That management chose to regard Leighty's connection, whatever it was, with the unsolved mystery of the gas valves, and the connection of Bright, Morgan, Hall and Vanek with the smoke bomb, as sufficiently serious under all the circumstances to warrant their discharge does not establish either interference with or discrimination because of lawful union activities. As in regard to the other incidents, there is no evidence of any kind that any other factor entered into the consideration of the Company in the case of a single one of the complainants.

Thus, even on the erroneous theory that the Company had the burden of proving the complainants were discharged for other than lawful strike activities, the Company sustained that burden and established by a preponderance of the evidence ample justification for the discharges.

CONCLUSION.

For each of the foregoing reasons we respectfully submit that the order of the Board should be vacated and set aside and that said order and each and every part thereof should be denied enforcement.

Dated, San Francisco, California,
May 4, 1951.

Respectfully submitted,
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